PUBLIC HEARING

COMMISSION ON STATE MANDATES

--oOo--

TIME: 9:32 a.m.

DATE: Thursday, November 30, 2000

PLACE: Commission on State Mandates
State Capitol, Room 126
Sacramento, California

--oOo--

REPORTER'S TRANSCRIPT OF PROCEEDINGS

--oOo--

Reported By: DANIEL P. FELDHAUS
CSR #6949, RDR, CRR

A P P E A R A N C E S

COMMISSIONERS PRESENT

ANNETTE PORINI, Chair
Representative of B. TIMOTHY GAGE
Director
State Department of Finance

WILLIAM SHERWOOD, Vice Chair
Representative of PHILIP ANGELIDES
State Treasurer

ALBERT P. "AL" BELTRAMI
Public Member

HEATHER A. HALSEY
Representative of STEVEN A. NISSEN
Acting Director
Office of Planning and Research

JOHN S. LAZAR
City Council Member
Turlock City Council

BRUCE ROBECK
Representative of KATHLEEN CONNELL
State Controller

JOANN E. STEINMEIER
School Board Member
Arcadia Unified School District

--o0o--

COMMISSION STAFF PRESENT

PAULA HIGASHI, Executive Director

PAT HART-JORGENSEN, Chief Counsel

SEAN AVALOS, Staff Counsel

KATHY LYNCH, Staff Counsel

SHIRLEY OPIE, Assistant Executive Director

PIPER RODRIAN, Staff Services Analyst

CAMILLE SHELTON, Staff Counsel

--o0o--

PUBLIC TESTIMONY

Appearing Re Item 2:

On Behalf of the State of California:

RAMON DE LA GUARDIA
State of California
Department of Justice
Office of the Attorney General
1300 I Street, Suite 1101
Sacramento, CA 94244-2550

On Behalf of the County of San Diego:

TIMOTHY M. BARRY
Senior Deputy County Counsel
Office of County Counsel
County of San Diego

JULIE STEWART
Life Mart Representative and
CMS Program Administrator

SANDRA McCHESNEY
CMS Program Director

JOHN McTIGHE
County of San Diego
Health and Human Services Agency

Appearing Re Item 3:

On Behalf of the County of Los Angeles:

LEONARD KAYE
Certified Public Accountant
Office of Auditor-Controller
County of Los Angeles
603 Hall of Administration
Los Angeles, CA 90012

ROBERT BALLENGER
Los Angeles County Animal Control

On Behalf of County of Lindsay and County of Tulare:

PAMELA STONE
Legal Counsel
DMG Maximus

4320 Auburn Boulevard, Suite 2000
Sacramento, CA 95841

PUBLIC TESTIMONY

Appearing Re Item 3: *continued*

On Behalf of San Diego County Department of Animal Control:

DENA MANGIAMELE
Director
County of San Diego
Department of Animal Control

JOHN HUMPHREY
Lieutenant
County of San Diego
Department of Animal Control

On Behalf of the California Department of Finance:

HIREM PATEL
Deputy Attorney General
State of California
Department of Justice
Office of the Attorney General

JAMES M. APPS
Principal Program Budget Analyst
State of California
Department of Finance
915 L Street
Sacramento, CA 95814

Appearing Re Item 4:

On Behalf of Alameda County Office of Education:

KEITH B. PETERSEN, MPA, JD
President
SixTen and Associates
5252 Balboa Avenue, Suite 807
San Diego, CA 92117

On Behalf of the California Department of Finance:

DAN TROY
Finance Budget Analyst
State of California
Department of Finance
915 L Street
Sacramento, CA 95814

PUBLIC TESTIMONY

Appearing Re Item 4 *continued*

On Behalf of the California Department of Finance:

LYNN PODESTO
State of California
Department of Finance
915 L Street
Sacramento, CA 95814

DANIEL G. STONE
Deputy Attorney General
Department of Justice
Office of the Attorney General
1300 I Street
Sacramento, CA 95814

Appearing Re Item 5:

On Behalf of County of Los Angeles:

LEONARD KAYE
Certified Public Accountant
Office of Auditor-Controller
County of Los Angeles

On Behalf of California Department of Finance:

JAMES M. APPS
Principal Program Budget Analyst
State of California
Department of Finance

Appearing Re Item 6:

On Behalf of Alameda County:

KAREN MEREDITH
Assistant District Attorney
Alameda County

PAMELA STONE
Legal Counsel
DMG Maximus

PUBLIC TESTIMONY

Appearing Re Item 6 *continued*

On Behalf of the County of Los Angeles:

LEONARD KAYE
Certified Public Accountant
Office of Auditor-Controller
County of Los Angeles

On Behalf of the California Department of Finance:

JAMES M. APPS
Principal Program Budget Analyst
State of California
Department of Finance

Appearing Re Item 7: *(This item heard out of order)*

On Behalf of the City of Newport Beach:

PAMELA STONE
Legal Counsel
DMG Maximus

KENT STODDARD (Sergeant)
Personnel & Training
City of Newport Beach Police Department

GLEN EVERROAD
Revenue Manager
City of Newport Beach

On Behalf of the California Department of Finance:

TOM E. LUTZENBERGER
Budget Analyst
Department of Finance

DANIEL G. STONE
Deputy Attorney General
Department of Justice
Office of the Attorney General

PUBLIC TESTIMONY

Appearing Re Item 8:

On Behalf of Clovis Unified School District:

KEITH B. PETERSEN, MPA, JD
President
SixTen and Associates

On Behalf of the California Department of Finance:

JEFFREY H. BELL
Principal Program Budget Analyst
State of California
Department of Finance
915 L Street
Sacramento, CA 95814

LEONARD KAYE
Certified Public Accountant
Office of Auditor-Controller
County of Los Angeles

Appearing Re Item 12

On Behalf of the County of Los Angeles:

LEONARD KAYE
Certified Public Accountant
Office of Auditor-Controller
County of Los Angeles

On Behalf of California State Association of Counties:

ALLAN BURDICK
Director
California State Association of Counties
SB 90 Service
4320 Auburn Boulevard, Suite 2000
Sacramento, CA 95841

On Behalf of Mandated Cost System, Inc.:

PAUL C. MINNEY
Girard & Vinson, Attorneys at Law
1676 North California Boulevard, Suite 450
Walnut Creek, CA 94596

PUBLIC TESTIMONY

Appearing Re Item 12: *continued*

On Behalf of the California Department of Finance:

CEDRIK ZEMITIS
Principal Program Budget Analyst
State of California
Department of Finance
915 L Street
Sacramento, CA 95814

--o0o--

ERRATA SHEET

Page	Line	Correction
_____	_____	____
_____	_____	____
_____	_____	____
_____	_____	____
_____	_____	____
_____	_____	____
_____	_____	____
_____	_____	____
_____	_____	____
_____	_____	____
_____	_____	____
_____	_____	____
_____	_____	____
_____	_____	____
_____	_____	____
_____	_____	____
_____	_____	____
_____	_____	____
_____	_____	____
_____	_____	____
_____	_____	____
_____	_____	____
_____	_____	____
_____	_____	____

I N D E X

I N D E X

Proceedings **Page**

I N D E X

Proceedings **Page**

--o0o--

BE IT REMEMBERED that on Thursday, November 30, 2000, commencing at the hour of 9:32 a.m., thereof, at the State Capitol, Room 126, Sacramento, California, before me, DANIEL P. FELDHAUS, CSR #6949, RDR and CRR, the following proceedings were held:

--oOo--

CHAIR PORINI: We'll go ahead and call the November 30th meeting of the Commission on State Mandates to order.

May I have roll call?

MS. HIGASHI: Mr. Beltrami?

MEMBER BELTRAMI: Here.

MS. HIGASHI: Ms. Halsey?

MEMBER HALSEY: Here.

MS. HIGASHI: Mr. Lazar?

MEMBER LAZAR: Here.

MS. HIGASHI: Mr. Robeck?

MEMBER ROBECK: Here.

MS. HIGASHI: Mr. Sherwood?

VICE CHAIR SHERWOOD: Here.

MS. HIGASHI: Ms. Steinmeier?

MEMBER STEINMEIER: Here.

MS. HIGASHI: Ms. Porini?

CHAIR PORINI: Here.

All right, the first item of business will be approval of the minutes, item number 1.

Any comments?

MEMBER BELTRAMI: Madam Chair, I am quoted -- and I think I did say it -- it's under the point where I indicated my daughter is working for the Humane Society, and that they had a contract with -- and I said the "county," and it really is the City of Santa Rosa rather than the County of Sonoma.

CHAIR PORINI: Okay, we can add that.

MS. HIGASHI: We can make that correction.

CHAIR PORINI: Any other comments?

VICE CHAIR SHERWOOD: Move for approval with that correction.

CHAIR PORINI: Second?

MEMBER STEINMEIER: Second.

CHAIR PORINI: We have a motion and second.

All those in favor, indicate with "aye."

(A chorus of "ayes" were heard.)

CHAIR PORINI: Opposed?

Motion carries.

That takes us to our second item of business, the proposed consent calendar.

MS. HIGASHI: There is one item on the consent calendar. And that is --

MEMBER BELTRAMI: That's left?

MS. HIGASHI: You know, we started out ambitious this month, and that's item 13, and that is adoption of the

proposed regulations --

CHAIR PORINI: All right.

MS. HIGASHI: -- regarding the SB 1033 process, and also to Article 1, which is the general section.

MEMBER STEINMEIER: Move approval of the consent calendar.

MEMBER BELTRAMI: Second.

CHAIR PORINI: We have a motion and a second for approval for the consent calendar, consisting of item 13.

All those in favor indicate with aye.

(A chorus of "ayes" were heard.)

CHAIR PORINI: Opposed?

The item carries.

Did you want to talk about proposed items that would be postponed?

MS. HIGASHI: Yes. I'd like to confirm that items 9, 10 and 11 are postponed.

CHAIR PORINI: So those are the Financial Compliance Audits, the School Site Councils and the County Treasury Oversight Committees.

MS. HIGASHI: These are all Proposed Parameters and Guidelines.

CHAIR PORINI: Right. So these are all going to be postponed.

MS. HIGASHI: Until the January hearing.

CHAIR PORINI: Great.

Any questions or comments?

All right. Then we'll move on to our first item of business.

MS. HIGASHI: Item 2, Proposed Statement of Decision of hearing officer will be presented by Staff Counsel Camille Shelton.

MS. SHELTON: Good morning. This item addresses the County San Diego versus State of California case, which is on remand from the California Supreme Court. In that case, the County of San Diego sought reimbursement under Article XIII B, Section 6, for the costs of providing health care services to medically-indigent adults who formally received medical care under Medi-Cal.

The California Supreme Court held that the medically-indigent adult legislation constituted a new program. However, the Court remanded the case back to the Commission to determine whether, and by what amount, the statutory standards of care forced the County of San Diego to incur costs in excess of the funds provided by the state and to determine the statutory remedies to which San Diego is entitled.

This case concerns the rights of the County of San Diego only and does not involve other counties.

One year ago today, the Commission assigned this

case to a hearing officer to prepare a Proposed Statement of Decision. Following the submittal of several briefs in a two-day hearing, the hearing officer submitted his Proposed Statement of Decision, a copy of which is attached as Exhibit B in your binders.

The hearing officer recommends that the Commission dismiss the County of San Diego claim for the reasons summarized on page three of the executive summary.

Under the Commission's regulations, the Commission may adopt, modify or deny a Proposed Statement of Decision prepared by a hearing officer. If the Commission does not adopt the proposed decision, the Commission itself may either decide the claim following a review of the record, or may remand the case back to the hearing officer to reconsider the claim and/or take additional evidence.

In the present case, both parties have submitted comments on the Proposed Statement of Decision. Both parties contend that the amount of credit applied by the hearing officer in the form of a surplus of Short-Doyle funds to reduce San Diego's claim for reimbursement is wrong. Accordingly, staff recommends that the Commission remand the Proposed Statement of Decision back to the hearing officer for reconsideration, in light of the comments filed by the parties.

Will the parties and their witnesses please state

their names for the record? Please state your names for the record.

MR. DE LA GUARDIA: Ramon de la Guardia, Deputy Attorney General, representing the State of California.

MR. BARRY: Timothy Barry, Senior Deputy County Counsel, on behalf of the County of San Diego.

Also present is Julie Stewart, who is a representative of Life Mart, the Administrator for the CMS program for the County of San Diego; and Sandra McChesney, who is director of the CMS program at the time in question, when the litigation initially arose.

Also present is John McTighe, who is with the Health and Human Services Agency for the County of San Diego.

CHAIR PORINI: All right, Mr. De la Guardia, would you like to begin?

VICE CHAIR SHERWOOD: Madam Chair, are we going to swear in the witnesses?

CHAIR PORINI: Yes. Sorry about that.

MS. HIGASHI: We're so eager to move ahead.

Will the witnesses in the audience, as well as at the table, please raise your hands?

Do you solemnly swear or affirm that the testimony which you are about to give is true and correct, based upon your personal knowledge, information or belief?

(A chorus of "I do's" was heard.)

MS. HIGASHI: Thank you.

CHAIR PORINI: All right.

MR. DE LA GUARDIA: Thank you, Madam Chair.

The staff's recommendation came as something of a surprise because what both parties agree on would be a minor change to one of the offsets in the proposed decision, would just reduce the numeric amount of the mental health surplus. I don't see any need to remand that.

And I think another reason for not remanding is, there's actually two components of this proposed decision.

One component is that the county has not established by credible evidence that it had a 41 million-dollar program in 1990-91; and because of that, it hasn't met its burden of proof with respect to funding.

And the second component is the various offsets, which I would take to be in the alternative; that if, for some reason, that finding was not sustained, then we go back and we reduce the offsets from what we do have evidence presented, that the county could not meet its burden of proof.

Now, the hearing officer based his decision on several factors, including the credibility of the evidence that the county presented; the fact that records were

destroyed and were not presented; the fact that the county presented evidence of revenues but not expenditures.

And we have evidence in the record showing the importance of having expenditures. We have evidence of at least three, possibly four, instances of a carryover of funds from '89-90 to '90-91, that the records show the county had a surplus. And that would be found on page 1067 of the administrative record. And that is just simply reached by the fact that the revenues they carried over from the prior year and the expenses they show from the prior year, there was an over 400,000-dollar discrepancy of surplus of revenues.

Then we also have evidence that in 1997 the county distributed 605,000 dollars from the fiscal years '90 and '91. And this is found at the administrative record on page 926 and 927. 185,000 dollars of that money was from the year in question, '90-91.

So this evidence alone shows that in -- excuse me, the third category would be the mental health, where the county presented records showing what they budgeted to spend on mental health, which was 2.9 million. But in actuality, the records they provided the Commission were not the records showing what they actually spent. We obtained those from the Department of Mental Health. And there was a discrepancy of 1.5 million dollars.

This is just an example of the importance of

being able to check revenues with expenditures.

Another component reached by the -- another reason why the administrative law judge found the county did not meet its burden was the fact that there was a program, the California Healthcare for Indigents Program, the CHIP Program, which is Proposition 99 money, which the county commingled. This county in this year commingled the program. It was not a separate program. The state provided funds for that program, which the county used for the same population and the same services. And the administrative law judge appropriately found that you couldn't distinguish between the two programs. This was state money that was being provided.

And finally, the other component for finding the county did not sustain its burden was the fact that it had actually set up what was the equivalent of an HMO program with its providers, where they created risk pools which limited the county's risk for expenditures to the amount provided by the state in these fiscal years. And they had set up a point system for providers, where they were paid so much per point for services. And if there was any money left over, that money would be distributed on a pro rata basis.

On the other hand, if there wasn't sufficient funds, then the providers would have to absorb the loss.

And when you put all these together -- now, these

may be voluntary aspects of the county; but the fact is, the Commission's duty is to determine whether there was a reimbursable mandate. And we know from prior cases -- the Lucia Mar and the City of El Monte, for example -- that when there are alternatives to spending county funds that are available, then they have to be considered to determine whether it's a reimbursable mandate. And the county has not shown that these alternatives were not in existence then.

It's always an issue -- I know that the county has stated that this was not an issue before the Commission, but this was always an issue before the Commission.

Addressing the second part of the proposed decision, I've addressed that in my reply, but I'll just say that there were certain SLIAG funds which also represented an alternative to the county expending its money. These were state-provided funds for legalized immigrants. There were the unaccounted-for CHIP funds, which the county has presented evidence purporting to show how those funds were accounted for. But that evidence is coming after a year that this has been before the administrative law judge. And it raises more questions than not because it shows that there were surpluses from the CHIP funds in interest that were carried over from the prior year, and there were surplus funds. So, again, we

have the question of surpluses.

We really see no need for remanding this. We see that minor change made to the mental health offset, and that should be sufficient after all the time we've spent on this case. It's been three years since the remand from the Supreme Court. It's been ten years since the claim was originally filed.

The fact that the county has destroyed records, has presented inconsistent records; that it has other funding alternatives of state monies or its own HMO is sufficient basis alone for the Commission to decide that the county has not met its burden of proof.

And I should also say that we're only dealing with this one year. That was one other item in the staff report that I have to take exception to, the county -- in the staff report, it says that the state did not provide sufficient funding for the year '89-90. However, the county has waived any claim to funds for that year. And so given the state of the record, we have to assume that there was sufficient funding; and given the fact that there were surpluses and carryovers, that there was sufficient funding for that year.

The subsequent years, the state created what's known as the "Realignment Program," where we started funding these services through the vehicle license fee and a sales tax. And as part of that, the state did impose the

"poison pill," which would provide that any reimbursable mandate would eliminate that funding mechanism after realignment.

But realignment apparently has been working and has been funding. So, really, what's before the Commission is only one year, one particular county's program. This is rather exceptional for the Commission, which usually deals with statewide mandates. And we have a well-reasoned and well-considered proposed decision, which finds that the county could not sustain its burden. And we have these alternative offsets, in case it's remanded. Because we do know from the state of the evidence that these offsets have to be imposed.

So I would urge the Commission to make that one change for the mental health funding, and then adopt a decision of the proposed decision of the administrative law judge.

Thank you.

CHAIR PORINI: All right, any questions from members?

All right, Mr. Barry?

MR. BARRY: Thank you, Madam Chairwoman.

I guess what I'll initially address is whether or not it should be remanded to the ALJ for further hearing. If you'd like, I can present my entire argument with respect to the merits of why the state is not entitled to

the credits and why it was erroneous for the ALJ to conclude that the county was not compelled to spend the 41 million dollars that it spent.

Would you like me to go ahead and make that argument now, or should I just simply address the issue of whether it should be remanded?

CHAIR PORINI: Why don't you address the issue of remand?

MR. BARRY: Okay. On the issue of remand, there are not only the mental health issues upon which the parties agree that the state is not entitled to a credit, there are other issues that are raised by the comments. And the remand -- the suggested remand indicates that the ALJ should reconsider his decision in view of those comments in their totality. I think that there are a number of factual and legal issues that are raised in the comments that we filed which address not only the mental health issues, but the SLIAG issue: Why is it not proper to give the state credit for SLIAG? Why is it not proper for the ALJ to give a credit for CHIP funding that was allegedly not accounted for? Why was it not proper for the ALJ to give credit for all of the mental health funding that was received by the county mental health department? Those are all issues that would be considered on remand.

So when counsel indicates that it's a very simple mathematical calculation, I don't think that's accurate.

The other thing I think that we need to address, and one of the factual issues; when I read the proposed decision, the ALJ states that the county continued to fund its CMS program at the 41-million-dollar level; the ALJ found that we spent 41 million dollars. What the ALJ did find was that the county was not compelled to spend that money.

In our comments to the proposed decision, we state -- we referenced the Supreme Court's decision as to why that is not even an issue, really, before this Court. The court has already found that the state was -- that the county was compelled to spend that money.

It was remanded for the purpose of determining to what extent the service levels -- the levels of service provided by the county exceeded the applicable standards of care. That was the scope of the remand.

And if you read the decision of the Court of Appeal in the County of Sonoma case, that came out just last week, in distinguishing the San Diego County case from the County of Sonoma versus Commission on State Mandates case, the Court said:

> "The County had to expend funds to provide health care services for a population formerly served solely by the state. San Diego County had a direct and ascertainable cost resulting from the state's action."

So the courts acknowledge what the Court said in the Supreme Court's decision in this case, that the county spent the money. So the issue is whether or not the county was compelled to spend that money, and that's the issue that we've also addressed in our comments.

So I think for the purposes of getting it right, which is, I think, the most important thing here, is to have it sent back to the ALJ, have him review the comments, address those comments, and come up with a decision that we know is correct.

That's really all the comments I have with respect to that.

There are a couple other items that with respect to -- there were a couple of credits that the ALJ gave the state and I was not able to determine why those credits were given. I've since been able to go back and figure out what it was. And if you'd like, I can explain that for the Commission and for the record, so that the ALJ can have that information. And assuming that it goes back to the ALJ, he can understand why those mathematical calculations were erroneous.

CHAIR PORINI: Let me ask staff at this point, if, in fact, this decision were to go back to the ALJ, would it be limited in scope or would we limit in scope what the ALJ would look at?

MS. SHELTON: You can. I agree that the

Statement of Decision, the reasons for the recommendation of a dismissal, is done in the alternative. The reason why we recommended that it was remanded back was because both parties agreed that at least the credits to the county's claim -- some of the credits were erroneous.

When I wrote this, I did not -- I don't know if the parties agree -- or the County of San Diego agrees with the state's position or requested amendments to that portion of the decision. So, to me, it's a substantive issue.

The hearing officer has reviewed the entire record and has held a two-day hearing. So it would be a matter, I believe, for him to decide, whether or not to change those numbers.

But you can just limit the remand back on that one particular reason on reducing the claim and leave the other reasons -- one being over the commingling of the funds and not providing supporting documentation; and the other, that they shifted the risk of financial loss to the private contractor. You can leave those "as is" and not remand it back on those issues.

MEMBER ROBECK: I have a follow-up question.

CHAIR PORINI: Mr. Robeck?

MEMBER ROBECK: Does that mean that the Commission could remand this back to the hearing officer and leave an open record, or go beyond the scope of what's

recommended here, in terms of issues?

MS. SHELTON: You can, yes. I mean, you can remand it back with any direction to the hearing officer that you wish to give to him.

If you wanted to remand it back to review and reconsider all of the arguments raised by the County of San Diego in their comments, you can do that.

CHAIR PORINI: Yes?

MEMBER ROBECK: Just a comment. I'm a little disturbed that, you know, we're coming up with a factual situation that both sides agree, after a hearing officer has heard something and both sides agree with that factual information, which may be diminished in value by the Attorney General in terms of -- but we're talking about, you know, several hundreds of thousands of dollars of potential costs here. And I'm disturbed that there might be other elements that have not been considered in this case.

You know, if you miss something that big, as much time as has been put into this and you still come up with an administrative decision -- an administrative law decision that seems to have a hole in it of substantial size -- a factual hole that both sides agree. And I just don't know if there are other factual issues that might also be missing.

CHAIR PORINI: I believe that this Commission has

four options under the APA: We can adopt the decision that the ALJ has provided. We can deny the decision that the ALJ has provided. We can modify to correct for errors. Or we can remand the decision back to the ALJ for rehearing; or we could, in fact, open the record and have the hearing ourselves.

So we have a variety of different options available to us.

MEMBER STEINMEIER: Madam Chair?

CHAIR PORINI: Yes, Ms. Steinmeier?

MEMBER STEINMEIER: I have a question for staff based on the testimony of both parties this morning.

Would you change your recommendation or modify your recommendation in any way?

MS. SHELTON: No, I would keep it.

MEMBER STEINMEIER: And you would make it open-ended; not just limited to the one issue?

MS. SHELTON: Well, I think a lot of the arguments raised by the County of San Diego have already been raised to the ALJ, at least with regard to the first two reasons for denial.

I think the real issue is in the calculation of the numbers, at least that's where there's agreement that there are some problems.

MEMBER STEINMEIER: So you would limit the scope -- the ALJ's remand to those issues?

MS. SHELTON: I hesitate because I am not the hearing officer. I wasn't the person taking in the evidence.

And, yes, I've reviewed the record, but only to determine -- to understand what the decision is.

I have not reviewed the record in the detail and depth that the hearing officer has. So I hesitate to answer you in that respect.

MEMBER STEINMEIER: Nice tap dancing.

I agree with Mr. Robeck that if this is found, in light of reading the comments of both parties, maybe the ALJ might find some other holes on his own. And, you know, this is why we send it to an ALJ initially, was that we didn't want to have to -- Camille, we didn't want her staff to have to dig that deep into it.

And so I'm inclined to remand it to the ALJ based on the comments that we have, not totally open-ended, but to review those comments and modify the decision accordingly. That would be my recommendation.

CHAIR PORINI: Mr. Robeck?

MEMBER ROBECK: The only thing I'd say is, we're not asking the ALJ to modify the decision but to reconsider the decision. So he could come back with the same decision.

MEMBER STEINMEIER: The same decision, theoretically.

MR. DE LA GUARDIA: May I comment, please?

CHAIR PORINI: Yes, Mr. de la Guardia; and then I think Mr. Barry wanted to conclude his testimony.

MR. DE LA GUARDIA: Oh, I'm sorry.

I just wanted to say that the error was just a very small error with respect to how to treat the surplus of mental health funds from the prior year. There were some categorical funds which could not be credited. That was a small technical error.

There was no real error in the amount. It's just in the treatment of this -- it's a rather collateral matter. And I really don't see that it warrants reopening the record for something like this.

And as I say, it's really a second alternative part of a carefully-reasoned decision that the ALJ spent quite a bit of time on.

So I would urge the Commission to just -- if there's going to be a remand, just to limit it to that one matter. I don't think it's necessary to reopen everything again after two days of hearing and after the creation of this voluminous record.

CHAIR PORINI: All right, Mr. Barry -- Camille, were you raising your hand to comment?

MS. SHELTON: Just to indicate that the recommendation was not to reconsider all of the evidence that has come in, but to only look at the comments that

came in on the Proposed Statement of Decision. That was it. I mean, I'm not recommending that the hearing officer open up all the evidence again and have another hearing or even take in additional evidence; just to simply review the comments filed on the Proposed Statement of Decision, to determine whether or not he would want to make any changes.

CHAIR PORINI: All right, Mr. Barry, do you want to continue your comments?

MR. BARRY: If I just may make -- there's three or four comments I'd like to make.

Number one, Mr. de la Guardia indicates that it's a small number. We contend that there is an 8,000,000-dollar error. And I don't think that's a small number. Mr. de la Guardia agrees that there is a 1.7 million-dollar error. I don't think that's a small number, either. So I don't think you can minimize the amount of money that we're talking about here.

Secondly, I've seen written and I've heard said here today that the county destroyed records; and I just cannot sit here and listen to this anymore. The alleged destruction of documents consisted of 12 pages of documents that were contained in a box that was destroyed between the period of time of the first inspection by the state representatives and the second inspection. Those were the goldenrod copies of the county's documents.

MEMBER BELTRAMI: Did they have chads on them?

MR. BARRY: Pardon?

MEMBER BELTRAMI: Did they have chads on them?

MR. BARRY: We counted them more than once.

Medicus maintained the pink copies of those very same documents of which is Exhibit 31 in the record. So it's a misrepresentation to say that there were records destroyed between the time that the auditor went there the first time and the second time; and that those records weren't available to the state's review. And I'm really tired of hearing that because it's not true.

The other thing I'd like to point out is with respect to the calculations. The ALJ gave the state a credit for 124,000 dollars, indicating that there was a difference between the -- let me get the numbers right -- between the 32,229,000-dollar number that the county was asserting was spent through Medicus on its program and the 32,102,518 dollars that was evidenced by the checks.

The ALJ is comparing apples and oranges there. The ALJ -- the 32,102,518-dollar figure does not include 140,580 dollars, which was paid for eligibility physicals, which was evidenced in the record. When you add that number to the 32,102,518, you get the 32,229,000-dollar number -- or 40,000-dollar number -- 43,000-dollar number.

And then if you look at Attachment A to our closing brief, there's a 13,000-dollar credit for the

general ledger adjustment that accounts for that money. So that's how we came out with the 32,229,000-dollar number.

The ALJ, understandably, in reading back through all of the masses of numbers that were presented to him, may very well have been confused on whether or not we had fully established the numbers on that claim.

The other issue that was raised by counsel was with respect to the alleged prior year funds that were left over. With respect to that, the record at, I believe, 1068 and 1069 talks about how the funding worked. Funds aren't necessarily spent in the next year or the next year. With respect to the CMS dollars, those funds are obligated to be paid. The claims sometimes are contested. They are sometimes not allowed. But, in fact, the record would demonstrate that for '90-91 claims, a portion of those funds were paid out in '91-92 and a portion of those funds were paid out in '92-93.

And, in fact, if you look at the general ledger account for '91-92 for Medicus, it would show that there was a 530,000-dollar deficit of expenses overfunding for that year. So you can't look at the general ledger as a snapshot in time and say, "Well, there was prior-year funding of 7,300,000, and prior-year expenses of 6,900,000. So they obviously had 400,000 dollars left over that they didn't spend." You can't do it. It doesn't make any sense to do it.

And the state wasn't advocating that as a credit, I don't believe. I think they were, in their brief, arguing that this is a discrepancy that we found, and the county can't account for it. Well, we never really attempted to account for that. It wasn't an issue.

But the ALJ has now then given the state a credit for that, to which we don't believe it is entitled.

Other than that, I have no other comments.

CHAIR PORINI: Questions from Members?

Mr. Beltrami?

MEMBER BELTRAMI: Mr. Barry, was this testimony given to the hearing officer?

MR. BARRY: Which testimony is that?

MEMBER BELTRAMI: That you just gave us.

MEMBER STEINMEIER: The last one.

MR. BARRY: The testimony with respect to the difference of the 124,000, all of that's in the record.

MEMBER BELTRAMI: Okay.

MR. BARRY: The discrepancies between the prior-year funding, that's in the record.

But what my point was, the state wasn't arguing that they were entitled to a credit for that amount at the hearing, or anytime after the hearing, I don't believe.

MEMBER BELTRAMI: Well, we did --

MR. BARRY: They were arguing that it was a discrepancy in the numbers; and, therefore, the state -- or

the county can't prove of its claim.

The ALJ went a step further in its proposed decision and said, "Oh, well, here's a number. There's a difference," and gave them a credit for 426,000 dollars, to which I don't believe was ever at issue in the hearing.

CHAIR PORINI: Mr. de la Guardia, did you want to --

MR. DE LA GUARDIA: We did argue it in our closing brief. We commented on the state of the evidence that the county presented. It's just one more discrepancy that the expenditures did not match up with the revenues that they showed. And they had introduced this evidence. And it just comes out at you that the numbers don't add up.

And there is no evidence in the record with respect to -- there is this evidence in the record. And the county -- this is just another instance of the county's records and not providing to the auditors, records or information about this.

And believe me, the auditors tried on several visits and phone calls to get the information.

And so we did comment in our closing brief, we commented on the evidence and the testimony. And this was the documentary evidence that they had presented.

CHAIR PORINI: All right, other questions from Members?

MR. BARRY: Madam Chairwoman, do I understand that what is under consideration now is whether or not to remand it?

CHAIR PORINI: What is under consideration is to accept the decision by the ALJ, to deny the decision by the ALJ, to modify the decision by the ALJ, to deny the decision and remand it back to the ALJ, or to open the record ourselves and hold another hearing. Those are the options before the Commission.

MR. BARRY: The reason I ask is, I have comments to the appropriateness of a number of other credits that have been given to the state; I have comments to the appropriateness of the finding that the county was not compelled to spend the money, beyond what I've said.

And if you'd like, I can take up the Commission's time at this point and maybe take 15 or 20 minutes or a half an hour to address those points. But if it's not going to be at issue, then I don't want to take up your time.

CHAIR PORINI: Well, why don't we see if there are other questions or comments from Members of the Commission?

MEMBER ROBECK: I'm ready to make a motion.

CHAIR PORINI: All right.

MEMBER ROBECK: I move that the Proposed Statement of Decision be remanded back to the hearing

officer for reconsideration, in light of the comments filed by the parties, the staff recommendation.

MEMBER STEINMEIER: Second.

CHAIR PORINI: All right, clarification. Is that at all limited as Ms. Shelton recommended or you're leaving it open-ended, and we're asking the hearing officer to, in essence, rehear the case de novo? Or are you asking only to have the record open to look at certain specific issues?

MEMBER ROBECK: As I understand the staff recommendation, it's reconsideration in light of comments filed -- past tense -- by the parties.

MS. SHELTON: Comments to the proposed decision, just to reconsider the proposed decision in light of the comments filed on that decision.

CHAIR PORINI: All right, we have a motion and a second before us.

Is there discussion by Members?

MEMBER BELTRAMI: Madam Chair, I just have one --

CHAIR PORINI: Mr. Beltrami?

MEMBER BELTRAMI: -- particular concern, and that is the hearing officer's statements regarding the contracts with the HMO. It seems to me that when a local party has used prudent fiscal management, which I think was probably the concern of the county in this instance, that if we turn around and say, well, these people did a good job, they

saved money; and, therefore, if there's no cost -- I'm just concerned on that because that whole philosophy can be carried a long way. And I would like to see that at least discussed by the hearing officer again without opening up every other avenue. But that's just my own personal concern.

CHAIR PORINI: Ms. Shelton?

MS. SHELTON: I believe that was contained in the comments by the County of San Diego to the proposed decision. So if the motion is passed, the hearing officer would review those comments and would be able to make any changes, if he feels it's necessary.

MEMBER BELTRAMI: Thank you.

MR. BARRY: Madam Chair, if I may?

CHAIR PORINI: Yes, Mr. Barry?

MR. BARRY: The Proposed Statement of Decision is silent on the issue of interest. And I know for purposes of at least having a complete record, it might be appropriate for the ALJ to address that issue.

CHAIR PORINI: Ms. Shelton?

MS. SHELTON: I know that it was a request filed by the County of San Diego if the claim was approved. But the ALJ has recommended a dismissal or a denial of the claim, in which case there would be no entitlement to interest. It would be up to the Commission if you want specific language or analysis of that.

MR. DE LA GUARDIA: May I comment, too? I think that would be --

CHAIR PORINI: Mr. de la Guardia?

MR. DE LA GUARDIA: -- rather presumptuous unless the ALJ finds a reimbursable mandate.

If there is no reimbursable mandate, then there is no interest; there's no principal to find interest on. And I would also like to say that Ms. Shelton has indicated that several of these issues have been briefed and discussed, and I wonder if the Commission -- for example, the mental health -- the entire mental health issue has been briefed several times and discussed, and I think the ALJ considered that. And I wondered if you wanted to foreclose any of those issues that have already been briefed.

CHAIR PORINI: I don't get a sense from the maker of the motion or the seconder to the motion, that they wish to limit it.

All right, so we have a motion and a second.

If there's no further discussion, we'll go ahead and call the roll.

MS. HIGASHI: Ms. Halsey?

MEMBER HALSEY: No.

MS. HIGASHI: Mr. Lazar?

MEMBER LAZAR: Aye.

MS. HIGASHI: Mr. Robeck?

MEMBER ROBECK: Aye.

MS. HIGASHI: Mr. Sherwood?

VICE CHAIR SHERWOOD: No.

MS. HIGASHI: Ms. Steinmeier?

MEMBER STEINMEIER: Aye.

MS. HIGASHI: Mr. Beltrami?

MEMBER BELTRAMI: Aye.

MS. HIGASHI: Ms. Porini?

MEMBER PORINI: No.

MS. HIGASHI: The motion carries.

CHAIR PORINI: All right, thank you very much.

We'll move on to item number 3.

MS. HIGASHI: Item number 3 is continuation of the test claim on Animal Adoption. This item will also be presented by Staff Counsel Camille Shelton.

CHAIR PORINI: All right, we'll go ahead and begin.

Ms. Shelton?

MS. SHELTON: Yes, this claim was originally presented to the Commission last month. The item was continued to allow further written comments to be submitted by Ms. Taimie Bryant, who is unable to testify. Her written comments dated November 17th are included in your binders at Exhibit W.

Staff has prepared a supplemental analysis to address new issues raised at last month's hearing by

interested party County of San Diego and subsequently by the claimants related to the seizure of animals under Penal Code Section 95.1.

For the reasons presented in the supplemental staff analysis, staff finds that the activities required by Penal Code Section 597.1 do not constitute a reimbursable state-mandated program. Staff continues to recommend that the Commission adopt the staff analysis prepared for the October 26th hearing, with the one amendment described in the supplemental staff analysis to the activity of providing prompt and necessary veterinary care for abandoned animals that are ultimately euthanized.

I will now turn the microphone over to the parties of the test claim for closing arguments.

Will the parties please state your names for the record?

MR. KAYE: Leonard Kaye, County of Los Angeles.

MR. BALLENGER: Robert Ballenger, County of Los Angeles.

MS. STONE: Pamela Stone on behalf of the County of Lindsay and County of Tulare.

DR. MANGIAMELE: Dr. Dena Mangiamele, San Diego County Animal Control.

MR. PATEL: Hiren Patel, Deputy Attorney General, on behalf of the Department of Finance.

MR. APPS: Jim Apps, for the Department of

Finance.

MR. HUMPHREY: John Humphrey, Department of Animal Control, San Diego County.

CHAIR PORINI: All right, I am going to take comments from Mr. Kaye and Mr. Patel. And I recognize that you'll be relying on the other members here.

Ms. Stone is raising her hand. She wants to make a comment. But I do not want to have another hearing of this issue. I want the comments to be brief. We indicated at our last meeting that this was going to be for vote only. Each of you have submitted written comments, so please be brief. And then we'll vote on the issue.

Mr. Kaye?

MR. KAYE: Thank you.

I will be exceptionally brief. And I've cut my presentation in half.

However, the other news is, the other half of my time I'd like to share with Dr. Mangiamele and Pam Stone. It will be very, very brief closing comments, if that's permissible.

CHAIR PORINI: I will allow Ms. Stone, representing Lindsay, and Mr. Patel only.

MR. KAYE: Okay. Well, I will try and then be -- just be brief then.

CHAIR PORINI: Thank you.

MR. KAYE: Without posing the remarks this

morning, our brief, I think it's well-recognized that we're in general agreement with Commission staff, including their supplemental analysis that you have before you today.

But particularly, I'd like to concur with staff's finding on page six -- on their page six, that reimbursement be provided for, quote, "Providing necessary and prompt veterinary carry for abandoned animals, other than injured cats and dogs, given emergency treatment that are ultimately euthanized."

Now, the thing that we admire about this is -- other than the fact that it's perfectly correct, in our view -- that it's very succinctly stated, and that it summarizes the new standard of care which we believe is imposed on the test claim legislation with great economy of expression. And we're all grateful for that.

Thank you.

CHAIR PORINI: All right.

MR. KAYE: Now, we do have some very small differences. With regard to limiting reimbursement for all programs to four days -- to a four-day holding period, we respectfully disagree with staff here. We believe that there is no legal basis for concluding that the six-day programs had to convert to four-day programs under the test claim legislation.

Rather, the mandatory provisions clearly and unambiguously allow a program to meet its new mandatory

requirements in one of two ways: Employing a six-day holding requirement or a four-day holding requirement. Therefore, we encourage the Commission to adopt recommendations which include both types of programs, and allow animals to be held the full six days, if necessary.

We simply do not see how an animal's life can be shortened -- can be shortened by two full days, particularly where the Legislature has provided otherwise.

Therefore, regarding staff's three recommendations concerning holding periods, we have added provisions to include a six-day program, just as the Legislature has explicitly done. These provisions and amendments to staff recommendations are found on your Bates pages 1622 through 1623.

We believe that staff's recommendation are otherwise consistent with a strict and a literal interpretation of the law, except, of course, Pam Stone has a few comments concerning the 14-day holding period.

With these small changes, we believe the Commission's work will be complete and the stage will be set for the development of Parameters and Guidelines, which address all programs, large and small.

Thank you.

CHAIR PORINI: All right, Ms. Stone?

MS. STONE: Thank you very much, Chairman Porini.

I would like to keep my comments to just the supplemental staff analysis, as we have gone over the other ground before.

And I would like to address the issue of the 14-day holding period under PC 597.1. The staff has concluded that there is no entitlement to reimbursement for the 14-day holding period because local agencies have the right to reimbursement either by owner redemption or through restitution and a criminal conviction. Unfortunately, local governments' experience has been the right to receive repayment is not equivalent to having the money in your pocket.

First of all, there is an assumption that an owner will have the wherewithal to redeem animals if they are, in fact, seized. The co-test-claimants, City of Lindsay and the County of Tulare, are located in the San Joaquin Valley, which, unfortunately, is not experiencing the economic prosperity of the Silicon Valley.

In excess of 30 percent of the individuals in this region are receiving some form of public assistance; and unemployment, unfortunately, even though the rest of the state is doing well, is still in double digits. So the assumption that the owners would be able to redeem the animals is not necessarily in fact.

Secondly, if the animals are euthanized, there is

no procedure for recoupment of costs.

With respect to convictions, there is an assumption that the court will, in fact, order 100 percent restitution to the full extent of the costs subsumed by the local government through the impounding period. Although the prosecuting authority can request full restitution, the ultimate issue of restitution lies within the sound discretion of the trial court, over which local government has no control.

So, therefore, the issue of restitution does not necessarily mean you will receive full reimbursement.

And lastly, if there is a prosecution which is not successful because the matter has not been proved to a jury or to a judge, if the jury is waived by clear and convincing evidence, then no restitution will be ordered, even though the individual may have, in fact, done the actions which were necessitated in the appropriate seizure. As a result of which, we would like to cordially suggest that the 14-day holding period be found to be a reimbursable component; however, that local agencies be required to exercise best efforts to obtain reimbursement from the owners, either by way of redemption fees, restitution or collection; and that those costs -- or, pardon me -- that those receipts be netted as against any costs incurred by local government.

And that is our sole request. Otherwise, we

reiterate our comments; and thank staff very much for its exhaustive work on this particular mandate.

CHAIR PORINI: All right, Mr. Patel?

MR. PATEL: Madam Chair, Members of the Commission, turning first to the supplemental staff analysis, we agree with its legal conclusions that the provisions highlighted in the supplemental staff analysis with regards to Penal Code Section 597.1 are not a reimbursable mandate.

Now, the City of Lindsay's statement with respect to somehow having a best-effort standard, we believe is not the legal standard for determining whether or not something is reimbursable under the Government Code Section 17556(d), which the legal standard is, if there is a mechanism for recovery of fees, then it is not reimbursable. That is specifically what the staff finds. It quotes the Connell decision on page six. It says, if there is authority to assess fees and collect reimbursable -- to collect expenses through a fee mechanism, that is sufficient and that ends the inquiry. So that's our comments with respect to the supplemental staff analysis.

Turning here to our closing comments, we won't highlight all of the statements we made during the October 26th hearing. We would like to emphasize one point, that we continue to believe that the test claim legislation imposes requirements on both public and private animal

shelters throughout the state; and, therefore, it is not reimbursable under Article XIII B, Section 6. It seems that the past analysis, both the staff analysis and the comments, hinged on the fact -- or concluded that Chapter 752 is not a law of general applicability because private shelters had no legal duty to take in animals or that they could say no to particular animals, while public shelters could not.

We believe that this conclusion is simply incorrect as a matter of law.

Professor Bryant's legal arguments that private humane societies are legally bound to take in animals into shelters where their charters require is uncontroverted. Neither the staff analysis nor the claimants have offered any legal argument to rebut this legal conclusion.

Moreover -- and again, this is very important -- the reality is that private shelters and humane societies play a crucial role in caring for stray and abandoned animals in this state. And they are bound and they are meeting the requirements of the test claim legislation. That is undisputed and uncontroverted.

You had various testimony talking about the effect of this legislation on these private humane societies.

But the essence that these humane societies contract with counties -- in some counties to provide their

animal care functions and private shelters, as Professor Bryant notes in her testimony, have been working since the early 1900's to some varying degree to care for stray and abandoned animals.

So there's two systems here: There's a public component and a private component that are active in this state. Given that fact, given the fact that where the public shelters have made it their legal duty to take care of animals, they are bound by the same requirements as the test claim legislation. They are open. It's uncontroverted that those they're open, that these public shelters -- pardon me, private shelters and humane societies are open and accepting animals, that they're meeting the requirements of the test claim legislation. Therefore, the test claim legislation applies to both governmental and private shelters and humane societies; and, therefore, it's not reimbursable under Article XIII B, Section 6, of our Constitution.

And thank you very much for the staff's diligent work. Although we don't agree with everything, we do appreciate their very competent job. Thank you very much.

CHAIR PORINI: All right, questions from Members?

Ms. Steinmeier?

MEMBER STEINMEIER: Well, I have a question for Camille on the last comment from Mr. Patel about do we provide any proof that the public and private are under the

same obligations?

MS. SHELTON: Well, I disagree with his legal argument. And I've provided that in the original staff analysis on page 20.

But essentially, I agree that the test claim legislation applies to both public and private entities. However, existing law, which was not changed or amended in any way by the test claim legislation does not require private entities to even accept stray or abandoned animals.

We do have a case on point, the City of Richmond versus the Commission on State Mandates. It was a case published by the Third District Court of Appeal. It did say when determining whether a reimbursable state-mandated program exists, you must look at the legislation in a broader context and not in its vacuum.

In this case when you look at the broader context, there is existing law which does not require private entities to pick up stray or abandoned animals.

Thank you.

MR. PATEL: Madam Chairperson?

CHAIR PORINI: Mr. Patel?

MR. PATEL: If permitted by the Commission, I'd just like to respond.

I think the staff is correct that you have to look at a broader context. Well, the broader context is, there is a body of law with respect to public and

charitable organizations that say they have to comply with their charters. There's been no discussion of that here; and, therefore, we find that although the staff does -- we feel that the staff analysis is incomplete and inaccurate, using language used by other people in other contexts with respect to their analysis of whether or not this is a law of general applicability.

CHAIR PORINI: Ms. Shelton?

MS. SHELTON: What is included in an organization's charter is up to the organization. There's no state mandate requiring that the agency include in their charter that they accept stray or abandoned animals.

VICE CHAIR SHERWOOD: Madam Chair?

CHAIR PORINI: Yes, Mr. Sherwood.

VICE CHAIR SHERWOOD: I'd just like to say it's a difficult issue, and no doubt it's the important issue here. But my tendency is to have to agree with staff on this particular issue because I think there was an option whether to enter into that charter.

I think staff has done an excellent job in this case and a fair job in looking at this matter. And I would like to make a motion to approve staff's recommendation as it currently stands.

CHAIR PORINI: All right, we have a motion.

Do I have a second?

MEMBER STEINMEIER: Second.

CHAIR PORINI: We have a motion and a second.

Discussion, Mr. Robeck?

MEMBER ROBECK: I would move to amend the motion to provide for six business days as part of the test claim statute.

MEMBER LAZAR: I'll second that amendment.

CHAIR PORINI: Wait a minute, let's separate this. We had a motion and a second and a substitute motion is always in order.

Does the seconder accept that?

MEMBER STEINMEIER: I do, for the purposes of the discussion.

CHAIR PORINI: Okay, for the purpose of discussion only then.

Mr. Sherwood, Mr. Beltrami --

MEMBER STEINMEIER: May I speak to it first?

CHAIR PORINI: Yes, Ms. Steinmeier?

MEMBER STEINMEIER: Mr. Robeck, I would prefer to say the actual. Because really what this comes down to is a facilities problem. If you cannot hold it very long, you might be forced to have extra business hours to comply with the four-day holdover. And if you had enough facilities, you might go with the six-day. So I would prefer to be the actual, whatever the agency is doing.

But you're saying a maximum of six; is that what you're saying?

MEMBER ROBECK: No, no.

MEMBER STEINMEIER: No? What are you saying?

MEMBER ROBECK: The motion was to modify the finding of four business days as the requirement to six business days, or four days -- actually, four calendar days. I don't think you specified business days, Camille.

MEMBER STEINMEIER: It's business.

CHAIR PORINI: It's business.

MS. SHELTON: It is business.

MEMBER BELTRAMI: I believe it's business.

MEMBER STEINMEIER: It's business, Mr. Robeck.

MEMBER ROBECK: But what the statute says is six business days or four days plus additional responsibilities.

CHAIR PORINI: Ms. Shelton?

MS. SHELTON: I guess my question on your motion, would you want to include as a reimbursable activity what the County of Los Angeles has recommended in that you would include -- leave the choice up to the local agencies, so that you would include the six-day and the four-day with the additional activities?

MEMBER ROBECK: It's "six or" that's the way the statute is written, "six or." And that's what my motion is, is to amend the finding to mean "six or four days plus."

MEMBER STEINMEIER: Okay.

CHAIR PORINI: All right, Mr. Beltrami?

MEMBER BELTRAMI: Madam Chair, before we get to the vote, I wanted to find out from Camille; do you have any comments about Ms. Stone's comments?

MEMBER STEINMEIER: On the 14-day?

MEMBER BELTRAMI: On the 14 days.

MS. SHELTON: I'm trying to remember what you said.

MEMBER STEINMEIER: What did she say?

MS. SHELTON: Okay, let me try to remember exactly what she said.

I disagree with what she is saying as I've already provided in the staff analysis. But, one, even if I agree with Mr. Patel that the court has already analyzed Government Code Section 7556(d), and it says, if you have the power, regardless of economic feasibility, then that section applies to deny the claim for reimbursement.

MEMBER BELTRAMI: So reasonableness doesn't enter?

MS. SHELTON: No. That did occur in the SID's (phonetic) case, but that case was not published, and we cannot rely on that case.

This case, the Connell case, is a published decision and is the law that we have to abide by.

MEMBER STEINMEIER: Unfortunately.

MS. SHELTON: Even if the court does not order

restitution, the owner is still personally liable civilly. And so they do have the power to collect those fees from the owner, whether or not that person is convicted or not or whether or not the court orders restitution.

CHAIR PORINI: All right.

MEMBER BELTRAMI: You know, most of the people that are in that system are there for a reason.

MEMBER STEINMEIER: They have no money.

CHAIR PORINI: Mr. Sherwood?

VICE CHAIR SHERWOOD: I would just like staff to comment also on the six- versus four-day. Because I believe in your recommendation you're recommending the four days due to the optionality of the six-day. That is one concern I have.

MS. SHELTON: Well, this is how I saw the legislation. I think the legislation gives options to the local agencies to either use the six- or four-day. Four-day is the minimum-required number of days they have to hold these animals. And so since that is the minimum number of days they have to hold the animals, that's what we found to be mandated. They have alternatives or options to hold it open for the six days. And that was how we saw it.

MEMBER STEINMEIER: It's the other way around.

CHAIR PORINI: Mr. Robeck?

MEMBER ROBECK: And, Camille, I respect your interpretation; but the way I read the statute, it says

they hold them for six days or they hold them for four days with conditional extra duties and responsibilities. So I see six days as the minimum holding period.

MS. SHELTON: I see both sides.

CHAIR PORINI: Okay?

VICE CHAIR SHERWOOD: I'm sorry, what was your last comment there, Camille?

MS. SHELTON: I just said that I see both sides, but I'd still stick with my recommendation for the four days.

CHAIR PORINI: Okay, Ms. Steinmeier.

MEMBER STEINMEIER: I want to be clear about the amendment before we vote on it.

CHAIR PORINI: Please.

MEMBER STEINMEIER: I want Mr. Robeck to restate his amendment because you made it a little more complete the second time you stated it, I believe.

MEMBER ROBECK: My motion was to modify the staff recommendation to provide for a minimum of six business days for the holding period, or four days, plus the specified statutory additional responsibilities, that's a weekend day, being open until a week night, until 7:00 o'clock. The only exception for that is with three or fewer employees for an institution.

MS. SHELTON: The County of Los Angeles has provided suggested language, I think, that would comply

with your motion. It's on Bates pages 1622 and 1623.

Actually, Mr. Robeck, would that language be consistent with your motion? On the bottom of page 1622, numbers 1, 2 and 3.

MEMBER ROBECK: Yes.

CHAIR PORINI: All right. So with that, Ms. Steinmeier, are you the seconder to the motion?

MEMBER STEINMEIER: Yes, ma'am.

CHAIR PORINI: Is there further discussion?

All right, we have a motion and a second before us. May I have roll call?

MS. HIGASHI: Mr. Lazar?

MEMBER LAZAR: Aye.

MS. HIGASHI: Mr. Robeck?

MEMBER ROBECK: Aye.

MS. HIGASHI: Mr. Sherwood?

VICE CHAIR SHERWOOD: Aye.

MS. HIGASHI: Ms. Steinmeier?

MEMBER STEINMEIER: Aye.

MS. HIGASHI: Mr. Beltrami?

MEMBER BELTRAMI: Aye.

MS. HIGASHI: Ms. Halsey?

MEMBER HALSEY: No.

MS. HIGASHI: Ms. Porini?

CHAIR PORINI: No.

All right, thank you very much.

MS. STONE: Thank you very much.

MR. KAYE: Thank you very much.

CHAIR PORINI: At this point in time, let's take a five-minute break.

MS. STONE: Thank you very much.

(A recess was taken from 10:34 a.m. to 10:56 a.m.)

CHAIR PORINI: Okay, we're going to go ahead and get started on item number 4.

MS. HIGASHI: Item number 4 is the claim on Emergency Apportionments. We started this test claim last month. This item will be presented by Staff Counsel Sean Avalos.

MR. AVALOS: Good morning.

CHAIR PORINI: Good morning.

MR. AVALOS: This test claim was continued from the October 26th Commission hearing. As explained then, this test claim relates to the restrictions and requirements placed upon school districts and county offices of education when a school district requests an emergency loan from the state.

One of the issues discussed at the previous hearing was whether the county offices of education are entitled to state reimbursement for costs associated with an emergency apportionment in excess of 200 percent of the requesting school district's fiscal reserves. Staff found that the increase in cost was the result of a cost shift

from one local government to another and, therefore, the test claim legislation did not constitute a new program or higher level of service. Staff based this finding on the court's holding in City of San Jose.

Claimant originally argued that City of San Jose did not apply to this claim because the present claim requires the cost shift between local agencies, whereas in City of San Jose the cost shift was merely authorized.

The Department of Finance disagreed and cited to El Monte to rebut claimant's objection to the City of San Jose. El Monte stands for the premise that a cost shift, regardless of whether it is required or not, does not constitute a new program or higher level of service. However, since El Monte, which is a relatively new case, the claimant members expressed an interest in reviewing a copy before deciding this issue. As a result, the Commission continued the discussion to today's hearing.

Since the last hearing, staff has revised its original recommendation that the Commission completely deny this test claim.

Staff now identifies three activities associated with the loans exceeding 200 percent of the requesting school districts fiscal reserves in which county offices of education are eligible for reimbursement.

Staff maintains, however, that the remaining costs incurred as a result of the state-imposed cost shift

would not be reimbursable under City of San Jose and El Monte.

Staff also maintains its finding that the test claim legislation does not impose a reimbursable state-mandated program on school districts because the test claim legislation only imposes activities on school districts after they voluntarily initiate the emergency apportionment process.

Staff recommends the Commission partially approve this test claim for the activities listed on page 20 of the staff analysis which includes 100 percent of the costs of seeking a cost waiver from the State Board of Education. If the cost waiver is then denied, 40 percent of the costs for reviewing, commenting, approving and submitting the school districts' fiscal plan to the State Controller's Office, the Auditor General and the Joint Legislative Budget Committee, 40 percent of the cost for reviewing, commenting and forwarding to the state -- SPI, the school district payment schedule.

All remaining test claim issues and code sections are denied because they do not constitute a new program or higher level of service and do not impose costs mandated by the state.

Will the parties please state your names for the record?

MR. PETERSEN: Keith Petersen, representing the

Alameda County Office of Education.

MR. TROY: Dan Troy with the Department of Finance.

MS. PODESTO: Lynn Podesto with Finance.

MR. STONE: Dan Stone of the Attorney General's office, appearing for the Department of Finance.

CHAIR PORINI: I am going to turn the gavel over to Mr. Sherwood for just a moment.

VICE CHAIR SHERWOOD: Thank you. Please note the gavel has been passed on.

(Ms. Porini temporarily left the hearing room.)

VICE CHAIR SHERWOOD: Mr. Petersen, I believe you're up first on this issue.

MR. PETERSEN: Thank you. This is the last of five test claims that were packaged together, which resulted from significant cornerstone legislation called AB 1200. It's actually Chapter 1213, Statutes of 1991. That may become important later if we get to issue number three. But the reference generally is to AB 1200 or 1213/91. And, again, it was a package of different test claims. You've already acted on the first four. This is the last of that package.

As I mentioned last month, I have three mutually interdependent threshold issues. If you take them one at a time, the decision you made on each one of them will affect decisions you make on the second and third decision.

The three issues briefly are, before going into depth -- briefly, the first one is that the school district loans are mandatory. That's the first threshold issue. The second one, if you agree they are mandatory, all the administrative activities in the statute and from the State Superintendent of Schools -- Public Instruction, excuse me -- are mandates; and third, that the costs to the county office are not discretionary; and that the San Jose and the El Monte cases do not apply.

There's been some movement -- some change in the staff recommendations since last month, and they're allowing some county office costs. But I'm speaking to some other county office costs.

So if you make a decision on the first issue, it affects your decision on the second and the third. So that's how I'd like to approach it, unless you have a different --

VICE CHAIR SHERWOOD: Sounds fine.

MR. PETERSEN: Okay.

The first issue is whether the state loan is mandatory and, therefore, reimbursable.

I have to burden you with two or three one-sentence citations from the record because they were not in the staff analysis. So I'll take that solely.

My first citation is on page 112 of the record. And it starts at the bottom. It's a footnote. It says,

"Education Code Section 41325 was added by Chapter 1213," which is the cornerstone legislation. The Legislature finds and declares that when a school district becomes insolvent and requires an emergency apportionment from the state in the amount designated in this article, it's necessary that the State Superintendent of Public Instruction assume control of the district in order to ensure the district's return to fiscal solvency."

So it appears to me that the Legislature believes that there is some requirement for this funding mechanism. And I hope to show you later that it's inevitable, not just an option.

The second citation I have is on page 466. This is a printout of the Butt case, which is the -- actually, we call it the "Richmond case" because it has to do with the Richmond solvency.

If you look at footnote 17, at the bottom of page 466, some of you are familiar with the Serrano case, so this is important. "The Serrano decisions themselves, as well as the subsequent adoption of Prop. 13," which most of you are familiar with, "have exacerbated the need for occasional emergency state intervention by restricting one aspect of local control -- the power of local districts to tax themselves out of financial crisis."

What that footnote says, there's no ability for a school district to tax itself locally out of a fiscal crisis.

The staff recommendation mentions the Madsen case. We discussed that briefly last month. The Madsen case is the Oakland School District, which is the other insolvent district that plays a part -- a bit part in the scenario. The Oakland School District convinced the City of Oakland to provide them a gift of funds, in lieu of going after a loan from the state. The Madsen case was an action by private parties, trying to convince the court that the City of Oakland could not give those funds to the Oakland School District.

The court said that the City of Oakland had a significant connection with the interests of children and that they could give the gift to the school district. That's not a loan case. It's not relevant to this case.

Staff has included it in their analysis because there is one sentence where the court reads out the statute pertaining to 200 percent loans, where it says, "A school district may request a loan." That's not a ruling on that language; it's just a statement that the language exists.

The Madsen case is about whether a city can give a gift; it's not about whether these loans are mandatory and reimbursable for that reason.

The third reason -- and this involves a couple of citations from the Butt case -- the Supreme Court in Butt said the state has an affirmative duty to step in and save

the school district. It had a duty to keep the doors open.

Much of the dispute in the Butt case, was that the state was making the case that the school district had screwed up its finances, and there was adequate funding in normal situations in the schools responsible for the problem it was encountering.

The Supreme Court in Butt said that, "We're not talking about whether the governing board of the school district screwed up; we're talking about the rights of the children to attend school."

And I have two short citations on that. Page 441. Again, these were not in the staff analysis, so I think it's important for you to consider them now. Okay, let me direct you to where that is. It's the second to the last paragraph. Let me see if I've got it. Excuse me, 444.

MEMBER BELTRAMI: Four hundred forty-what?

MR. PETERSEN: Four hundred forty-four.

I had several cites. I don't think you want to go through all of them. It's the second to the last paragraph.

"In sum, the California Constitution guarantees basic equality in public education, regardless of district residence. Because education is a fundamental interest in California, denials of basic educational equality on the basis of district residence are subject to

strict scrutiny. The State is the entity with ultimate responsibility for equal operation of the common school system."

And this is the sentence I want you to remember:

"Accordingly, the State is obliged to intervene when a local district's fiscal problems would otherwise deny its students basic educational equality, unless the state can demonstrate a compelling reason for failing to do so,"

which they did not in this case at all. That is the significant finding of the Butt case.

The finding in the staff recommendation was the technical finding, that the trial court did not have the power to tell the state which funds to use to bail out Richmond. That was the reason for the loss on that case. The trial court was in error, telling the state which funds to use.

The finding -- the holding in this case is the state's obligation to intervene, to keep the schools open for the kids; and not the fiscal irresponsibility of the school district.

Okay, for those reasons, I believe in fact and in practice, since there is no local method to raise funds for fiscal crises and there is no other source absent -- I don't know that the City of Oakland wants to give gifts to

districts all over the state -- but absent some benefactor, the only option available -- and if it's your only option, it there becomes the only way, and that is to get a loan from the state, which makes it mandatory to keep the schools open for the kids. That's the first threshold issue.

Do you want me to proceed to the second or do you want to vote on that or --

VICE CHAIR SHERWOOD: No, no, let's proceed.

MR. PETERSEN: Okay. The second threshold issue is if the loans are mandatory, the administrative tasks associated with implementing the loans are mandated activities and reimbursable. And, again, I would return to my first citation, and that was Education Code 41325, which is, again, back on page 112. That is legislative intent. I think its descriptive of what the subsequent sections discuss. It indicates that the State Superintendent of Public Instruction assumes control of the district in order to ensure the school district's return to fiscal solvency. And that is the case in the 100 percent and the 200 percent loans.

And on the following pages, 114 and 115, you can see the plethora of activities that the statutes mandate. And there will be a section that indicates that the superintendent appoints an administrator for the district; the district's governing board loses all of its power.

This is currently happening at Compton Unified School District and is currently happening in Coachella. Richmond is out of its crisis. I don't know Oakland's status. It seems to be alternate years, crisis-in, crisis-out. But this is happening now. It just occurs to a few school districts.

The point again I'm making is, once the loan kicks in, these administrative tasks kick in. The cost of performing these tasks are assessed against the school district and the county office, and they should be reimbursed for performing these tasks.

And I don't think we need to go into the listing of tasks involved. It is long. If you decide that these tasks are reimbursable, of course, the test claim will have to reimburse those tasks -- excuse me, readdress those tasks and decide which ones are new.

The third threshold issue is even if you decide that the state loans are not mandatory and even if you decide that the school districts should not be reimbursed for its administrative activities because it took the loan, my third issue is, once the school district starts this thing in motion, the State Department of Education starts its activities in motion also and several duties fall upon the county office of education, who had no choice in the matter from the onset. So even if you decide everything at this point is not reimbursable, the county office is stuck

with these tasks.

I indicated earlier, the staff's recommendation was slightly modified in the past month to allow reimbursement for some of these tasks upon the issue of whether the county office went for a waiver of its share of the expenses. That is some of what I'm asking for; it's not everything.

Again, if you agree that the county office tasks are not discretionary, they should be reimbursed in full, the test claim will have to readdress those lists of statutory duties and decide which ones should be reimbursed.

And I'll wait and defer anything on the San Jose case. In short, San Jose -- I don't believe San Jose and El Monte applies because the facts are dissimilar. In the law business, you cite a court case or a law if you think it applies to your facts or if you think it doesn't apply to your facts and you want to contrast it. In this case, those cases do not apply to these facts here.

If that becomes an issue later on, I can go back and rebut that more completely.

Thank you.

VICE CHAIR SHERWOOD: Thank you, Mr. Petersen.

If the other Members don't mind, I think we'll move on to the Department of Finance and hear their information.

MR. STONE: Thank you, Mr. Sherwood. Let me see if I can adjust this mike so I'm not leaning the wrong way.

VICE CHAIR SHERWOOD: Could I stop you one second?

Have we sworn these people in?

MS. HIGASHI: They were.

Were all of you present at the beginning of hearing, when we did the swearing in?

MR. STONE: I was.

MS. HIGASHI: I think they were.

VICE CHAIR SHERWOOD: Okay, fine, thank you.

MR. STONE: Dan Stone for Finance.

We support the staff's recommendation insofar as they treat local school districts, that aspect of the claim. And we supported the staff's initial analysis with respect to the county office of education, when they recommended that the claim be denied entirely.

(Chair Porini returned to the hearing room.)

MR. STONE: We disagree, of course, with the revision that has been --

VICE CHAIR SHERWOOD: Mr. Stone, if I might interrupt you, I'd like to pass the gavel back to the Chair, Ms. Porini.

CHAIR PORINI: Please continue.

MR. STONE: Fine, thank you.

We don't believe that the revision is a logical

or fair analysis of the circumstances. And we continue to believe that the county offices of education should have their claim denied as well.

First, with respect to Mr. Petersen's comments though I wanted to point out two things. One, with respect to school districts, there are two layers of discretionary choices that have to be considered.

Mr. Petersen addressed what we believe to be a discretionary choice of the school districts to seek an emergency loan from the state, as opposed to an array of other decisions they could make in terms of sound local fiscal management to reduce or eliminate the crisis. But more importantly and initially, it was local decisions with respect to managing their funds and ignoring their budgets, in the first place, that created the fiscal crisis. The state in no way mandates -- you cannot point to any state statute or executive order that dictates that local districts go into the red. I mean, the state policy and state laws are quite to the contrary. It's local discretionary decisions that create the emergency in the first place, and then it's at the option of the local school district to seek this kind of emergency apportionment rather than to cut its budget, cut its spending, behave more responsibly at the local level in managing its funds and staying within its budget. So it's both levels that have to be considered. The state has no

say in either one of them.

Secondly, when he talks about the state -- in citing the Butt case, he talks about the state being mandated to come to the aid of students and protect their rights to education when there has been local fiscal mismanagement but, indeed, holds that. But it's quite beside the point. He's talking about the state being mandated to do something, and that's not the issue. The issue is whether the local district, by state statute, is mandated to incur the costs here at issue. And the state, as I said, does not mandate that the local districts make fiscal decisions that are irresponsible and lead to budget crises and the state does not mandate that where there is the beginning of budget crisis or a full-fledged budget crisis, the state doesn't say, "Come to us and get money."

The state has taken care of its mandate under Butt by making these emergency apportionments available. But they've also conditioned them on certain changes in the local fiscal management, which are entirely appropriate and will lead to better fiscal management in the future.

Now with respect to our points with the county office of education. Staff's revised recommendation suggests that there are reimbursable state-mandated costs in two areas -- three areas, as they have them in bullet points but I've divided into two.

First is the costs that the counties incur in

seeking a waiver; and the second -- this, by the way, all refers to situations in which the school district in its discretion has chosen an amount for the loan it seeks that is greater than 200 percent of its available fiscal reserves. Again, that's a discretionary local decision. The state doesn't require them to seek loans in the first place but certainly doesn't require them to seek loans in excess of 200 percent of their fiscal reserves.

But when that happens, the state law says that county offices of education shall bear 40 percent of the cost of the emergency apportionment if they don't obtain a waiver. And we submit that the obtaining of the waiver is the same as under 17556(d) fee authority on behalf of the county. The reason it's the county's fee authority is because the waiver is automatic if the county shows compliance with certain oversight responsibilities that it has been statute, anyway. If the county has been obeying the law and looking over the shoulders of these school districts and trying to keep them within their budgetary constraints, then the county doesn't pay a dime.

If the county -- again, local discretionary choice -- if the county elects to disregard its legal obligations under the statutes, then it may not be eligible for a waiver. But, again, that's a local decision. So the 40 percent of costs that it might incur is entirely a result of decisions made at the county level.

As to the costs of seeking waiver, Section 41328(b), we believe, makes those recoverable as part of the waiver. That section says that, notwithstanding the 40 percent/60 percent split imposed by subdivision (a), quote, "the district receiving the loan shall pay all costs associated with the implementation of this article if" -- and then it goes into the two options for getting waiver. The second one is that the, "County office of education in which the district is located seeks and is granted a waiver from the state board based on its implementation and compliance with" -- and then it lists several sections which, as I say, are based on county oversight responsibilities.

And then once the waiver is obtained, it shall be applicable until the loan is paid off by the district. In other words, it's a one-time effort by the county to show that it has complied with the law. If it so shows, then it has no obligation to pay any costs associated with the loan, until the loan is paid off; and, obviously, none thereafter.

So the waiver itself covers, in our interpretation of the statute -- and I think it's a very reasonable one -- the waiver covers the costs of seeking the waiver. That cost is thrown to the school district to pay if the county has, in fact, complied with its statutory obligations.

Then with respect to the second part of what the staff's revised analysis suggests are reimbursable costs, these are the costs associated with the school district's emergency loans of greater than 200 percent of its fiscal reserves. And these involve review and comment of the school district's fiscal plans and review and comment with respect to the school district's repayment schedule for the loan principal. Again, it's entirely a matter of local discretion.

First and foremost, none of these costs occur unless the school district itself, a local agency, has exercised its discretion in going into debt, in seeking a loan; and thirdly, in choosing an amount of a loan principal that exceeds by more than 200 percent its fiscal reserves. And then there are the county's discretionary decisions.

The only way the county can incur costs is, first of all, if it has, by its own volition, disregarded the oversight laws that give it some fiscal responsibility locally; and second, if they don't even apply for a waiver, then, of course, they won't get one. I suggest that every county would comply -- would apply for a waiver, if it has complied with and implemented the laws requiring it to exercise oversight responsibility over the school districts.

Then even if the costs weren't the result of all

these layers of local discretion, they are merely a shift of costs between local agencies. The staff's recommendation points out that under prior law, school districts would be responsible for 100 percent of all costs associated with emergency apportionments. Now, under the statute, in certain circumstances, counties have to take care of 40 percent of those costs. But they're both local agencies. The state is in no way placing costs that it previously took care of upon a local agency. It's dividing local agency costs between two entities.

I suggest that the staff's recommendation is inconsistent with the pages toward the end of its analysis, in which it recommends that this Commission accept and adopt the rule from San Jose and El Monte, the two Court of Appeal decisions, because if the Commission follows San Jose and El Monte, as the staff recommends, then it cannot find a reimbursable state mandate in what is undisputedly just a shift of costs from school districts to county offices of education.

Then my last point, with respect to this revised analysis, is what we submit is a policy nightmare, because under staff's revised analysis and recommendation, there would be a huge disincentive for fiscal management -- responsible fiscal management at the local level. It would actually encourage county offices of education to shirk their oversight duties and, therefore, be ineligible for

the waiver. And it would also encourage local school districts to seek larger loans; that is, to get further into debt at the local level. Because the more irresponsible the local fiscal decisions are, the greater the chance that the state will be required to pay reimbursement under the staff's analysis.

And so the consequences wouldn't fall on the wrongdoers at all, under this analysis, as intended; but, instead, the costs would be shifted, for the first time, to the state. The costs have always been borne by local agencies.

Accordingly, we submit that the test claim should be denied, as was recommended in staff's first analysis.

CHAIR PORINI: All right, any other comments from Finance?

MS. PODESTO: Yes, I think Mr. Stone laid out the arguments very, very well. I just want to reiterate, I think on a policy basis, what the Legislature has done is laid out the responsibility at the local level for managing budgets of the districts, obviously, who are expending most of the money, and the county offices in reviewing those budgets and ensuring that the districts stay in line.

Now, if you accept the claimant's point of view, it's going to remove all incentives because there is going to be no fiscal consequence for either the district or in the case of the county, no fiscal consequence for

participating in the costs of recovery, which is going to destroy the incentive to manage the budget at the local level. And I think that's at the crux of the issue here. We urge you to find no merit in any of this claim.

CHAIR PORINI: I just have a point of clarification for Mr. Stone. You probably really didn't didn't mean to say that county offices of education would deliberately not follow the law.

MR. STONE: Thank you.

CHAIR PORINI: You were just saying that if, in fact, that happened, it took away the incentive?

MR. STONE: The disincentive.

CHAIR PORINI: Yes.

MR. STONE: Yes, in fact, I don't quite understand -- I mean, I call it a discretionary decision; but query whether a county office of education can disregard its statutory obligations, but only if it has disregarded them, does it become ineligible for the waiver.

CHAIR PORINI: Yes, so I think we were all kind of scratching our head with that and wanted clarification.

MR. STONE: Thank you. I apologize.

CHAIR PORINI: Okay, all right, Mr. Petersen?

MR. PETERSEN: Well, I have a few things to rebut.

First of all, I don't think any local agencies or

a school district would consider a point of discretion to decide to become insolvent. I don't think they make plans to become insolvent. So that's not a discretion.

Insolvency is an outcome of a series of decisions made by local governing boards. And I think that's important because much is said of apparently the county office, apparently some sort of organization that's not paying attention to what's going on with the school districts, and that's not the case. And I'll cite the Butt case here in a moment. But I'd like to say, I know personally of the county -- the scope of the county's activities, and this Commission knows because two months ago you adopted a test claim reimbursing significant portions of the county office oversight. They are doing their oversight duties and you're reimbursing some of them.

The county office has no power over the school district's governing board. If the school district governing board agrees to make a series of bad decisions -- and I'm not saying that's what happened, but that seems to be what is being intimated by the other side of the table here -- if there are a series of bad fiscal decisions made, the governing board of the local district has the power to do that. The county office cannot stop that. Therefore, they're not derelict in not stopping them.

The Department of Finance, in the Butt case and also in this test claim, has made much of the punitive

effect of not assisting school districts when they go insolvent. Perhaps that is a policy worth considering, but it was discussed at length in the Butt case, and now I have to refer you back to page 444. It goes on for several pages but they've taken Mr. Stone's, the Department of Finance's issues into consideration in this case, and the same issues today.

At the first paragraph, on the top of page 444: "Finally, nothing in our analysis is intended to immunize local school officials from accountability for mismanagement or to suggest that they may indulge in fiscal irresponsibility without penalty. The state is constitutionally free to legislate against any recurrence of the Richmond crisis. It may further tighten budgetary oversight, impose prudent non-discriminatory conditions on emergency state aid, and authorize intervention by state education officials to stabilize the management of local districts whose imprudent policies have threatened their fiscal integrity. To the extent such conditions compromise local autonomy and mortgage a district's future, they are not calculated to persuade local officials or their constituents that mismanagement and profligacy will be rewarded."

The courts address this issue. The fact that loans are available is not of concern to this court, that everybody will go out and start seeking loans.

The issue in the Butt case is not the poor performance of the Richmond School District, it's the educational opportunity for the students. The court reaches down to the student, not to the governing board.

And the court has said here on 444, that there are things that the state can do. And indeed what the state did was adopt AB 1200 as a result of this case, and that's described in great detail in another footnote which we don't need to spend any time on. But the footnote describes -- Footnote 18 describes in detail what AB 1200 has done to improve the fiscal accountability. And, again, you've addressed those issues in two prior test claims.

So I think we ought to toss out the punitive effect of punishing board members for being poor board members. The court in Butt said the issue was the students going to school; it wasn't how well the board performed.

A minor issue the Department of Finance had indicated that choosing a loan amount was discretionary. I think you can take on personal knowledge that they will ask for the funds they need. I don't think they will have much of a choice deciding whether they hit the 200 percent mark or not. It certainly wasn't the case in Richmond.

Which is to say, in total, that things that are

listed as discretionary are only discretionary if you're the Department of Finance. Obtaining a loan from the Legislature and the Department of Finance, I'm sure, is like buying supplies from the company's store. It's not something you really want to do, if you can avoid it. So I wouldn't think any of this is discretionary. Even though there are different ways to get to the finish line, you still have to get to the same finish line.

And, again, I'll reserve on San Jose, if San Jose becomes an issue.

CHAIR PORINI: All right, questions from Members?

Ms. Steinmeier?

MEMBER STEINMEIER: I would like to take it in the order that Mr. Petersen posed it. And you weren't here, Madam Chairman, so I apologize.

The first question was, is this a discretionary act on the part of the school district that would trigger all these other things that would happen. So that's a really good place to start because if the answer is no, then a lot of stuff doesn't happen.

In the course of time, very few school districts have actually claimed -- or actually have become bankrupt.

MR. PETERSEN: That's my understanding.

MEMBER STEINMEIER: You said less than five; right?

MR. PETERSEN: That I know of, yes.

MEMBER STEINMEIER: That I know of, too. And there are --

MR. PETERSEN: Most school boards are doing their job, obviously.

MEMBER STEINMEIER: Well, yes, there's nine hundred-plus school districts in California.

CHAIR PORINI: 1,040.

MEMBER STEINMEIER: Well, that counts county offices, too, I think, in that number. Those are just school districts?

CHAIR PORINI: Yes.

MEMBER STEINMEIER: Okay. So there's over a thousand school districts in California, for the sake of argument, and five have gone bankrupt. This is not an activity that any school board member -- if you're a city councilman, you wouldn't want this to happen either. I mean it's death. So I think the disincentive is there, regardless of what the law says or not, with all due respect to Mr. Stone. No one wants it to happen. And because of several things that have happened over the years, partly because of legislative decisions and the decisions by the voters in California, namely Prop. 13 that you mentioned, most school districts in California only have a three percent reserve. So 200 percent of a three percent reserve is just six percent of your budget. That's not much money.

I don't think it's -- I think going bankrupt is not discretionary. It's something -- I am a fiscal conservative -- I wouldn't want that to happen. But to be off by three percent, something major could happen in terms of facilities or a lawsuit or something that could send you --

MR. PETERSEN: Earthquake.

MEMBER STEINMEIER: Pardon me?

MR. PETERSEN: Earthquake.

MEMBER STEINMEIER: Or earthquake. Something could send you into bankruptcy because it was an unforeseen activity and, frankly, reserves are very slim for school districts in California to operate. That's just a fact of life.

County offices, as I see them, from the bottom looking up, are agents of the state. And we regularly get letters and communications about our financial situation. Usually, they tend to err in the extreme, saying you'll be, you know, fiscally insolvent if you continue this course for three years. And we get those letters all the time, and we've never been bankrupt. It's just that our reserves are so small, that we get really close. So I don't think it's discretionary. That's my view as a school board member, knowing hundreds of school board members in California. This is our worst nightmare, politically and every other way, this is not what you want to have happen.

I personally don't -- I know someone from Compton, and they did get some bad advice is what happened. And they eventually -- in that rescissionary period is when a lot of these happened, when the state funds were actually cut back. So in other words, these were not -- these were decisions predicated on some assumptions that didn't happen.

So if we use the "reasonable person" standard, I think we start out with the "yes" on the threshold question. That's just my viewpoint.

And then what happens from there, I think we'd have to take those step by step, if the other things are triggered and what the county has to do.

CHAIR PORINI: If I might just comment.

MEMBER STEINMEIER: Uh-huh.

CHAIR PORINI: I disagree with you for several reasons. And the first is just a plain reading of the statute, that says "may request." And while I don't disagree with you that it is a very drastic step for a school district to take, because boards of school districts are elected by the parents of kids in those schools, it has a lot of consequences. But nonetheless, the plain reading of that statute says "may," and that means that they may do it or they may not, which, in my mind, makes it a discretionary act.

MR. PETERSEN: Excuse me, Member Porini, when you

were out, you missed another section that we cited that says the other thing, it's on page 112. It wasn't in the staff analysis but I did cite that. And they were exposed to it and you weren't. I don't know whether it will change your mind or not, but it might be worth mentioning.

CHAIR PORINI: All right.

MR. PETERSEN: It's on page 112, at the bottom.

MEMBER STEINMEIER: It's the Ed. Code.

MR. PETERSEN: I raised it on the plain reading of the statute, though. I raised it there.

CHAIR PORINI: Yes, Mr. Sherwood?

VICE CHAIR SHERWOOD: Along that line, Keith pointed out several items that were not mentioned in the staff report. Did the staff take those items into consideration?

MR. AVALOS: Well, first, I need to point out that it's "required" or "may." The statute -- the test claim is not -- the statute that we're talking about, whether or not it's "required" or "may" is not part of this test claim. That predates 1975, when the discretionary language of "may request an emergency apportionment." This test claim is the activities -- the additional activities added between 1981 and 1995. So I don't know if that gives a better -- it just gives a framework of what we're talking about.

MEMBER STEINMEIER: It's predicated on that.

VICE CHAIR SHERWOOD: I guess back to the question, though, were you aware --

MR. AVALOS: I was aware of those comments, but I --

MR. STONE: May I speak, too?

I think the provision that Mr. Petersen has cited this morning is not inconsistent with the language that Chair Porini pointed out, that the school districts may, in their discretion, seek an apportionment. When they apply for it, they represent to the state that they need it. So they say, "We require the assistance from the state."

It doesn't mean the state is saying, "Every school district with just a problem requires an emergency appropriation." The requirement is something that the school district itself represents: "We need this money. Please give it to us." And then the state puts conditions on it.

CHAIR PORINI: Staff, did you want to continue?

MR. AVALOS: The one thing that I wanted to point out with the Butt case -- that was an equal protection case. It dealt with equal protection of students. It didn't necessarily make a ruling on mandates.

And in that case what happened was that Richmond requested an emergency apportionment. Initially, the Legislature said, "Okay, we'll help you out this time."

Later, they were in financial distress again. They requested a second one.

The Legislature said, "No, we're not in the business of bailing you out."

What happens is, later, then they went through the courts, and the courts said, "No, the state has the fiscal responsibility for equal protection of the students."

That was overturned, as Mr. Petersen indicated, and said, "No, you cannot force the Legislature to apportion funds."

One interesting thing that I noticed in El Monte, which is different than from the City of San Jose, what we were using it for the last hearing, but on page 355, El Monte actually cites the Butt case and distinguishes it from equal protection from mandate reimbursement. And it's the second and third paragraph on page 355, on the right-hand column. And the second and third full paragraph. And I'm going to read a few sentences out of those combined paragraphs, and I think it will make the point.

"El Monte sites Butt versus the State of California for the proposition that education is the ultimate responsibility of the state. However" -- and this is in the second paragraph -- five, six lines down -- "However, it is the State of California's policy to

provide for the maximum feasible degree of local autonomy. Thus, the Legislature has established a policy providing to the extent feasible, autonomy for local school districts and for a variety of purposes school districts have been held to be separate political entities rather than the state."

So in that case, when we're looking at this for mandate reimbursement, I understand the state has the ultimate fiscal responsibility; but for mandate-reimbursement purposes, the law separates the two. So I don't think we can say -- we create -- it would almost wipe away mandate reimbursement law if we said the state always has fiscal responsibility for school districts.

CHAIR PORINI: Okay.

MEMBER BELTRAMI: Madam Chair?

CHAIR PORINI: Mr. Robeck and Mr. Beltrami.

MEMBER ROBECK: I think everybody wants a piece of this. But I'm a little troubled by the use of the words "may apply," which refuses to recognize the context of how the school districts actually have to operate. And that the state provides a framework for labor contracts, for example; the state provides formulas and basis for apportionments. The state does all kinds of things and may -- overemphasis on the word "may" is a simplistic approach to what is a complex relationship between state and local

communities in conducting schools.

And so the state -- "the district may apply for an emergency apportionment," has to be taken in the context of everything else that's going on. And it's not quite so simple just to take that in isolation.

However, having said that, I will point out, I do know factually there are instances in which school districts have been in financial distress who have not gone to the state but have gone to the county for a loan, which is a permissible activity.

I know that's happened in Riverside, and I'm sure it's happened --

MR. PETERSEN: Excuse me, those are short-term loans.

MEMBER ROBECK: Those are short-term loans. But, you know, fiscal distress is fiscal distress. We're not defining how big or how long it is.

And so it is a very complicated situation. I just -- I just want to point out that the permissibility is extremely complex in what options the school district has when they have fiscal problems. And sometimes their fiscal problems are not entirely of their own making.

CHAIR PORINI: All right, Mr. Beltrami?

MEMBER BELTRAMI: I guess everybody that goes to bankruptcy court probably says that also.

Mr. Petersen, can school districts reduce

programs at the local level?

MR. PETERSEN: I have a school district expert I'd like to call up here.

Are you still here?

Based on my seven years of working at San Diego Unified School District, there is some discretion.

Member Robeck makes a good point. The state mandates collective bargaining and they mandate the curriculum. They mandate the length of the school day. They limited the amount of money we can raise locally by the revenue limit. But as to your question, I'd like to send that over to Dr. Berg.

MEMBER BELTRAMI: Can you lay off a deputy superintendent?

MEMBER STEINMEIER: Sure, yeah.

MEMBER BELTRAMI: Can you cut the budget?

MR. PETERSEN: I think you can do that. But I think the point in the Richmond case is, they were at the point where they were going to lay off teachers, and then that's just like not having school.

MEMBER BELTRAMI: Had they laid off any management?

MR. PETERSEN: In Richmond?

MEMBER BELTRAMI: Yes.

MR. PETERSEN: I don't know for a fact, but as Mr. Avalos points out, that was their second year. They

had received the state loan the prior year, so I suspect heads were rolling by that point, sir.

MEMBER BELTRAMI: Okay. Are school districts empowered to borrow private funds from banks or anything of that nature?

MR. PETERSEN: We searched the Government Code and the Ed. Code, and there's nothing that says they can or can't. And the Ed. Code is a code of -- what's that term -- permissive. So I guess they could.

Although I think as a practical matter, if you're a local agency and you're insolvent, the chances of getting private funds other than a gift, again, as a practical matter, are nil. I can't say that that's true as a fact. But I think you can take notice that if you're insolvent, getting a loan from Bank of America is not going to be an easy push.

They have the opportunity of doing something called "trans." Everybody does trans. It has nothing to do with insolvencies. It's cash flow funding forward to -- because you get your money twice a year in the school business. That's another problem they have. You get two or three chunks of money. You have to borrow money to make payroll on a monthly basis, and you use "trans" to do that.

MEMBER BELTRAMI: Right.

MR. PETERSEN: But you cannot use "trans" to exceed the income you're going to receive that year. So

the problem in these cases -- the Richmond cases -- is, you run out of money, so you can't raise money beyond the money you're going to get. So there's no way to "trans" that. There's no short-term loan for that because you can't pay it back.

This is an instance where you will never have enough money to pay off temporary financing because the state won't give you any more money, in the normal funding.

MEMBER BELTRAMI: Section 41320, is that tied into 41325? In other words, does that follow in sequence?

MR. PETERSEN: There are two types of loans. I'm trying to figure which Section 41320 finds itself.

MEMBER BELTRAMI: Page two.

MR. PETERSEN: Okay, I'm getting there. It's page two of the test claim?

MEMBER STEINMEIER: The staff analysis.

MEMBER BELTRAMI: I guess what I'm a--

MR. PETERSEN: 41320, I believe, is the 100 percent --

MEMBER BELTRAMI: What I'm asking you is just when you make a finding that you are insolvent and apply for the loan, does that trigger then the administrative changes from the county office, and that sort of thing?

MR. PETERSEN: Yeah, according to the statute --

MEMBER BELTRAMI: I mean, there isn't a separate

aspect where you can borrow money without that?

MEMBER STEINMEIER: No.

MR. PETERSEN: Oh, no.

MEMBER BELTRAMI: Okay.

MR. PETERSEN: They're tied together. I don't have personal experience in that, but the statute reads that one follows the other.

MEMBER BELTRAMI: Okay, that's what I was wondering. Okay.

You mentioned that the COE had oversight function, but then you indicated there was really no control over the local --

MR. PETERSEN: In a broad aspect, all year long, the county office has certain duties, fiscal oversight function over the school districts.

MEMBER BELTRAMI: Right.

MR. PETERSEN: It collects their budget; it recommends revisions. It sends the budget back to the school district, revises the budget, sends it back to the county office. If they didn't revise it the way they wanted it, the county office has to send it to the state because the state has the hammer.

So that was the subject of the two test claims two months ago, and you approved some of those oversight things.

MEMBER BELTRAMI: Yes.

MR. PETERSEN: The fiscal crisis oversight kicks in when the loan statute kicks in.

Member Steinmeier makes a good point. They receive numerous letters throughout the year, indicating hypothetically, "You're pushing your reserve, you don't have enough, your collective bargaining agreement is going to bankrupt you in two years," and they have to respond. But they can just essentially say, "Thank you for the information. We're an independent entity and we're going to do what we want."

MEMBER STEINMEIER: Tough luck.

MR. PETERSEN: So it's like having somebody there telling you what you're doing wrong, but they can't force you to change what you're doing.

MEMBER BELTRAMI: So it's not much of an oversight. I mean, I guess it's an oversight.

MR. PETERSEN: It's more of a professional nagging, I think.

MR. STONE: Well, may I add something?

CHAIR PORINI: Mr. Stone?

MR. STONE: Our point was that whatever the power of the county may be over the local school districts, as long as the county shows that it did its job --

MEMBER STEINMEIER: Right.

MR. STONE: -- then it's free of any cost. It gets the waiver.

MR. PETERSEN: No, no, no.

MEMBER ROBECK: It can apply.

MR. STONE: Well, the Department of Education treated it as automatic, 41328(b)(2). That is, if the county can show that it has implemented and complied with Sections 42127, et seq., then it obtains a waiver.

But we haven't had the evidence --

MEMBER ROBECK: It has to show fiscal risk.

MR. STONE: -- that a county has in fact complied with and implemented those and has been denied a waiver.

MEMBER ROBECK: It may -- isn't the decision with the state?

CHAIR PORINI: The State Board of Education.

MR. STONE: The State Board of Education.

MEMBER ROBECK: Yes.

MR. STONE: And as I say, they filed a --

MEMBER ROBECK: They may grant it; right? It's not required that they grant it when certain conditions are met. It's a conditional -- it's permissive on the part of the state to grant --

MEMBER BELTRAMI: The waiver or not.

MEMBER ROBECK: -- the waiver.

MR. STONE: I suppose that's true. My only point -- I don't know whether Education is here, but in the letter that the Department of Education submitted --

MEMBER STEINMEIER: It's not automatic.

MR. STONE: -- presumably on behalf of the Board of Education, they treat it as automatic. That is, if the county office has complied, then the waiver shall be granted. The language speaks for itself in the statute.

MEMBER ROBECK: I do believe the language speaks for itself.

MR. STONE: But there's no evidence by the claimant that anyone has, in fact -- any county office has, in fact, complied with the specified statutory obligations and been denied a waiver.

MEMBER STEINMEIER: But compliance is in the eye of the beholder, and that beholder would be the State Board. So, yes, if they can make a significant case, that's true. But it still is an objective decision on the part of the State Board. I don't know what happened in the Richmond cases and in all the others. I assume they were so obvious that they were granted, but I don't know.

CHAIR PORINI: Mr. Petersen?

MR. PETERSEN: On that point, I think it's curious that the staff recommendation feels that the applying for the loan, "you may apply for the loan" makes it discretionary. But as one of the conditions for reimbursement for the county office, they say they "must apply for the waiver," and the statute doesn't say that. So you can't have it both ways.

And the other condition for the waiver is the

county office has to show its own fiscal distress. And that's, by far -- if you're at that point, the whirlpool is dragging everyone down.

CHAIR PORINI: All right, Mr. Robeck?

MR. PETERSEN: I didn't mean to take your thunder.

MEMBER ROBECK: I'm done.

MEMBER BELTRAMI: Madam Chair?

CHAIR PORINI: Mr. Beltrami?

MEMBER BELTRAMI: Another question on some of the previous testimony. Since Prop. 98, have the schools had a decline in state funding?

MR. PETERSEN: I can tell you my experience in San Diego Unified School District, and I'm not an expert on Prop. 98.

MEMBER BELTRAMI: Yeah. Well, 40 percent of all their revenues are going to go -- or have a minimum of 43 --

MR. PETERSEN: There are three tests deciding how much you get, depending on the condition of the statewide economy, you're either test 1, test 2 or test 3, and that tells you how much money you get.

In my personal experience at San Diego Unified and it's probably reflected in the Richmond cases and other districts that Carol can speak to, in the late '80s and early '90s, we all the remember those horrible years when

they had to close a 14 billion-dollar gap one year. The test, 1 or 2 -- whatever test it used -- was so lean, that there wasn't even enough money to maintain current staffing levels, because you get more kids, you hire more teachers.

MEMBER BELTRAMI: Is that why ERAF was put in?

MR. PETERSEN: Yes, sir.

MEMBER BELTRAMI: Okay.

MR. PETERSEN: And we thank the counties, but I know they never did thank us. In fact, they've litigated several times.

Yes, sir, it was to shift those funds to guarantee the 40 percent for either one of those tests.

MEMBER BELTRAMI: Right, right.

MR. PETERSEN: Really, the counties took a bigger bath than we did.

MEMBER BELTRAMI: Okay, thank you.

MR. PETERSEN: But we have kids.

CHAIR PORINI: Finance staff wishes to comment.

MR. TROY: It seems that in this discussion, that Prop. 98 has been discussed as a ceiling when, in fact, it's a floor of funding for school districts.
In fact, the Governor in the last couple years has decided to go well above Prop. 98. So it is not a ceiling.

MR. PETERSEN: Is that a policy statement from the Department of Finance?

MR. TROY: It's a plain reading of the --

MR. PETERSEN: Can we have that on the record on your behalf?

CHAIR PORINI: I think he's quoting actuals.

MR. PETERSEN: Okay.

CHAIR PORINI: They're in the process of preparing the budget now, so stay tuned January 10th.

MR. PETERSEN: I've got to get the page number of the transcript for that one.

CHAIR PORINI: All right, other questions?

MEMBER STEINMEIER: No.

CHAIR PORINI: Comments?

Mr. Robeck?

MEMBER ROBECK: I lied. I have to comment. I'd like to thank the staff for their revised analysis because I think it does represent the reality of how the county office operates relative to school districts within their county who have fiscal distress, and the reaction that the county has to do. I do believe that the way the statute was set up and the way it, in fact, operates is the county has been put in as an agent of the state and given specific responsibilities that they did not have under prior statutes for those responsibilities, in the event of a school district seeking -- an emergency apportionment when greater than 200 percent of their reserves.

MEMBER STEINMEIER: Was that a motion, Mr. Robeck?

MEMBER ROBECK: Was that a motion?

MEMBER STEINMEIER: Was that a motion?

MEMBER ROBECK: No, that wasn't.

MEMBER STEINMEIER: Just a statement, huh?

MEMBER ROBECK: Just a statement.

MS. PODESTO: May I comment on that?

I think by taking the point of view that the county should be fully reimbursed for this, kind of thwarts the legislative intent here that the counties offices and all local entities share in the cost of recovery. It seems to undo what the Legislature intended by doing that, by allowing that virtually automatic full reimbursement for all the costs.

MEMBER HALSEY: I'd like to make a motion.

CHAIR PORINI: Ms. Halsey?

MEMBER HALSEY: And that is, that there's no mandate on either part, either above or below the threshold. That is what the original staff analysis --

MR. AVALOS: Would you want to make a motion to adopt the original staff analysis?

MR. PETERSEN: I'm sorry, that includes a finding of reimbursable costs, so that wouldn't be consistent with her motion.

MEMBER HALSEY: No.

MR. PETERSEN: I'm sorry.

CHAIR PORINI: So you are revising the staff's

recommendation to say that there are no reimbursable costs in either situation?

MEMBER HALSEY: Exactly.

MR. AVALOS: That would be the original staff analysis.

MEMBER STEINMEIER: It was a total denial; wasn't it?

MR. AVALOS: A total denial, yes.

CHAIR PORINI: All right, I'll second that.

Mr. Robeck?

MEMBER ROBECK: I offer a substitute motion to adopt the current staff analysis.

CHAIR PORINI: The substitute motion is always in order. I would not second that, but let's open it up for discussion.

MEMBER STEINMEIER: Well, I will second it for the purpose of discussion.

CHAIR PORINI: Okay. Discussion?

MEMBER BELTRAMI: What was the substitute? I'm sorry.

MEMBER STEINMEIER: The current staff analysis.

MEMBER ROBECK: Current staff's report.

MEMBER BELTRAMI: The staff's report?

MEMBER STEINMEIER: Which is a limited reimbursement.

MEMBER ROBECK: Right.

CHAIR PORINI: All right.

MEMBER ROBECK: I just want to comment, if I may, to Joann regarding the -- I think it's a very complex issue --

MEMBER STEINMEIER: Extremely.

MEMBER ROBECK: -- as to whether or not a school district is required to go to the state. And there's a lot that school districts can and should do over time periods. And I think the maneuvering room within the current budget year is severely limited. And they have to go do all kinds of things to make serious changes in their budget. But I do think that there are ample warning mechanisms set in place; and that school districts, if they heed those warning mechanisms, can back out of trouble. And that's why I don't believe that it's a mandate to go for a state apportionment. That's why, you know, on question number one, I have to go "no."

MEMBER STEINMEIER: After AB 1200, I agree with you. But prior -- is there a gap between AB 1200, though, and the -- or is it the other way around -- between the date of the test claim legislation and AB 1200, how close are they in time? Is there any gap?

CHAIR PORINI: I don't know.

Staff?

MR. PETERSEN: I can respond. Most of the test claim legislation is AB 1200.

MEMBER STEINMEIER: It's the same?

MR. PETERSEN: It's the same thing.

MEMBER STEINMEIER: The same time exactly?

MR. PETERSEN: Yes, the response to the Richmond case.

MEMBER STEINMEIER: Okay.

CHAIR PORINI: All right, we have a motion.

Is your second --

MEMBER STEINMEIER: Yes.

CHAIR PORINI: -- a permanent second now on the substitute motion --

MEMBER STEINMEIER: Yes, it is now.

CHAIR PORINI: -- to adopt the revised staff analysis -- staff recommendation.

May I have roll call?

MS. HIGASHI: Mr. Robeck?

MEMBER ROBECK: Aye.

MS. HIGASHI: Mr. Sherwood?

VICE CHAIR SHERWOOD: No.

MS. HIGASHI: Ms. Steinmeier?

MEMBER STEINMEIER: Aye.

MS. HIGASHI: Mr. Beltrami?

MEMBER BELTRAMI: Yes.

MS. HIGASHI: Ms. Halsey?

MEMBER HALSEY: No.

MS. HIGASHI: Mr. Lazar?

MEMBER LAZAR: No.

MS. HIGASHI: Ms. Porini?

CHAIR PORINI: No.

MS. HIGASHI: It's a three-four vote.

CHAIR PORINI: All right, does anyone want to -- Ms. Halsey, do you want to make your motion again, since the revised motion failed?

MS. HIGASHI: So her motion is still on the floor then, I believe.

CHAIR PORINI: All right.

MEMBER HALSEY: It needs a second.

CHAIR PORINI: Well, I second it. So there's a motion and a second.

Is there discussion?

Hearing none, let's call for the roll.

MS. HIGASHI: Mr. Sherwood?

VICE CHAIR SHERWOOD: Aye.

MS. HIGASHI: Ms. Steinmeier?

MEMBER STEINMEIER: No.

MS. HIGASHI: Mr. Beltrami.

MEMBER BELTRAMI: Yes.

MS. HIGASHI: Ms. Halsey.

MEMBER HALSEY: Aye.

MS. HIGASHI: Ms. Lazar?

MEMBER LAZAR: Aye.

MS. HIGASHI: Mr. Robeck?

MEMBER ROBECK: No.

MS. HIGASHI: Ms. Porini:

CHAIR PORINI: Aye.

MS. HIGASHI: The motion carries.

MR. PETERSEN: Excuse me, for the record, what was the motion?

MS. HIGASHI: The original motion.

MEMBER BELTRAMI: The original motion, no mandate.

MS. HIGASHI: No mandate.

MR. PETERSEN: Okay, so you're not adopting the staff's understanding?

CHAIR PORINI: The original.

MR. PETERSEN: Thank you.

CHAIR PORINI: All right, thank you.

MEMBER LAZAR: Madam Chair, are we going to take a lunch break?

CHAIR PORINI: I was going to ask Members if they want to do that.

Should we take a half hour or 45-minute lunch break and come back? We do have a lot of the agenda still left to complete.

MEMBER LAZAR: Yes, I'd like that.

CHAIR PORINI: Okay, then let's say that we will come back at a quarter to 1:00. Thank you.

MS. HIGASHI: When we come back, we'd like to

take up item 7 out of order because one of our staff members will have to leave.

CHAIR PORINI: All right, so we'll come back on item 7 at a quarter to 1:00.

Thank you.

(Midday recess taken at 11:56 a.m.)

--oOo--

(The proceedings resumed at 12:51 p.m.)

CHAIR PORINI: All right, after a brief recess, we'll call the meeting back to order.

And we're going to move directly to item number 7.

MS. HIGASHI: That's correct. And before we start this part of the hearing, may I just ask, have all of the witnesses and parties at the table been sworn in?

(Chorus of "ayes" was heard.)

MS. HIGASHI: Thank you.

Item 7 is the test claim on Elder Abuse, Law Enforcement Training. This item will be presented by Staff Counsel Kathy Lynch.

MS. LYNCH: Good afternoon. This test claim addresses elder abuse training for city police officers and deputy sheriffs at a supervisory level and below, who are assigned field or investigative duties. Staff finds that the test claim statute is subject to Article XIII B, Section 6, of the California Constitution, because it

imposes an obligation on local agencies to provide elder abuse training, when the training occurs during the police officer or deputy sheriff's working hours, or when the training occurs outside the police officer or deputy sheriff's regular working hours, but the agency is required to pay for the training because of an obligation imposed on it by an existing memorandum of understanding.

Staff further finds that the test claim statute constitutes a new program, since elder abuse training was not required before the enactment of the test claim statute.

Finally, staff finds that the test claim statute imposes costs mandated by the state, but only for the following activities: One, the cost to present the one-time two-hour course in the form of trainer time and necessary materials provided to trainees; and two, for salaries, benefits and incidental expenses for each police officer or sheriff to receive the one-time two-hour course, but only in cases where the police officer or deputy sheriff has already completed his or her 24 hours of continuing education, and must also complete an additional two hours under the -- of elder abuse training under the test claim statute. Accordingly, staff recommends that the Commission approve the elder abuse training test claim as outlined above.

Will the parties and witnesses please state your

name for the record?

MS. STONE: Good afternoon. Pamela Stone on behalf of the City of Newport Beach.

MR. STODDARD: Ken Stoddard of Newport Beach Police Department.

MR. EVERROAD: Glen Everroad, City of Newport Beach, Revenue Manager.

MR. LUTZENBERGER: Tom Lutzenberger, Department of Finance.

MR. STONE: Dan Stone, Deputy Attorney General, for the Department of Finance.

CHAIR PORINI: All right, Ms. Stone?

MS. STONE: Thank you very much, Chairman Porini.

Good afternoon, ladies and gentlemen, Members of the Commission.

We would like to concur with the draft staff analysis, or the final staff analysis of your Commission staff, and are very appreciative of the hard work that has gone into this.

I would like to introduce Sergeant Kent Stoddard, who is the training supervisor with the City of Newport Beach Police Department, who will speak very briefly on this matter. And we are all available for questions.

CHAIR PORINI: All right. Mr. Stoddard?

MR. STODDARD: Good afternoon.

I'm a sergeant with the Newport Beach Police

Department. I've been there for over 30 years. I'm currently assigned as the personnel and training supervisor or sergeant, the same thing. I've been so assigned for the past five years.

Elder abuse cases in the United States number in excess of one million per year. Elders are people over 60 years of age and they make up 13 percent of the population. They will increase to over 25 percent of the population by the year 2050.

Three to ten percent of all elders are abused or neglected. An abuse can be physical, psychological, financial, sexual or through neglect.

The elder abuse training required by PC 13515 necessitated scheduling all of our field and investigative officers and supervisors from various shifts and days off for this special training session. Required group training like this is difficult to arrangement. Maintaining compliance with the
ever-increasing training demands placed on law enforcement has become challenging in recent years.

And I'll be happy to answer any questions you might have.

CHAIR PORINI: Questions from Members?

Next witness?

MR. EVERROAD: Glen Everroad, Revenue Manager for the City of Newport Beach and SB 90 coordinator for the

City of Newport Beach.

I'd like to thank the Members for hearing this test claim and the staff analysis for this test claim.

We agree with the staff's determination relative to this test claim.

CHAIR PORINI: All right, questions?

Mr. Stone or Mr. Lutzenberger?

MR. STONE: Dan Stone, on behalf of the Department of Finance.

The Department generally concurs with the staff analysis and recommended decision. But we have a couple points of clarification which I hope are just technical and won't create any controversy. The one, I'll address; and one, Mr. Lutzenberger will address.

The point I want to make is, I don't know your page numbers in here (indicating), but on TC page 17, the staff sets out in table form the circumstances under which they believe reimbursement is appropriate. As I say, we concur in that.

But then when it's set out at the bottom paragraph of that page in text form, one of the elements of the table -- and we think it's an important element -- doesn't appear to be included in the text.

And all I'm saying is, if you read the table, the reimbursement is required when a trainee has already completed his or her 24 hours within the two-year cycle,

and must complete the elder abuse training before the next two-year cycle of training begins. Because if they have time to complete the training, the elder abuse training within the new cycle, then it's two hours going toward the new 24.

I just didn't see any language in the text, either at that bottom paragraph on 17, or in the summary of the mandate on 19, that reflected that second requirement, that the deadline for completing the elder abuse has to occur before the new cycle for two-year training begins; otherwise, the two hours can be put toward the new 24.

So I have language which, on page 19, at the end of the last bullet there, where it says -- the last line, it says, "Education, when the requirement of Section 13515 applied to the" --

MS. STONE: Excuse me, where are you located?

MR. STONE: Excuse me, TC 19.

MS. STONE: Where on that page?

MR. STONE: The last of the four bullet points, and the last line of that bullet point.

I would change after "particular officer," instead of a period, we would have a comma, and then say "and where a new two-year training cycle does not commence until after the deadline for that officer or deputy to complete elder abuse training."

MS. STONE: Could you do that once more again,

very slowly? Because I can't -- this is the first -- just for the record, Commission Members, this is the first we've heard of this. And it's very difficult to try and understand Mr. Stone's meaning, when he speaks so quickly that it's impossible to copy down what he's saying.

CHAIR PORINI: I'm sure that he will repeat it until we all get it down. I also only got halfway through it. And we'll ask staff to comment, too.

MR. STONE: The first meeting was just to get the thought across. And the Department is not wedded to this language.

But do you understand, Ms. Stone, the point, and do the Members understand the point? We just want, in the next, to reflect what staff has already put in their analysis, in their table, which is --

MS. STONE: That's correct. I have no problems with that.

MR. STONE: Okay.

MS. STONE: My concern is, when there's a request to put in additional language that we haven't seen and it is stated so quickly, you have no opportunity whatsoever to understand or comprehend --

CHAIR PORINI: We'll make sure that everybody gets it.

So maybe, Mr. Stone, if you have that written, if you could pass it over. Or can you read it again for us

slowly?

MR. STONE: I'd be happy to read it as slowly as you wish.

CHAIR PORINI: So this is TC 19 after the fourth bullet? The sentence --

MR. STONE: The last line of the fourth bullet, where it ends with "applied to the particular officer," we would insert a comma there, and then the following language, "and when a new two-year" hyphenated "training cycle does not commence until after the deadline for that officer or deputy to complete elder abuse training."

MS. STONE: Was that "officer or" --

MR. STONE: "Or deputy to complete elder abuse training."

MEMBER ROBECK: After "commence."

MR. STONE: After "commence"? "Until after the deadline for that officer."

MEMBER ROBECK: Okay, I got it.

MR. STONE: You got it?

CHAIR PORINI: Okay, everybody got it?

Okay, staff?

MS. LYNCH: That's consistent with our analysis.

CHAIR PORINI: That would be consistent?

MS. LYNCH: Yes, it is.

CHAIR PORINI: Great.

MS. STONE: I have no problems with that

language.

CHAIR PORINI: Great.

Mr. Lutzenberger?

MR. LUTZENBERGER: Madam Chair and Members of the Commission, we would raise one other point as a concern for clarification. And I say this before I go into detail; this might be handled more appropriately under Proposed Guidelines and Parameters, but we're not sure, so that's why we raise it now.

With regards to the definition of what constitutes -- if the Commission decides that this claim constitutes a state mandate that is reimbursable under state law, the staff analysis is somewhat ambiguous -- and with all due respect to the Commission staff -- with regards to exactly what costs should be associated with a trainer and necessary materials for the course. We would request that clarification be made exactly what costs are appropriate. And we raise this concern because it was also agreed -- we viewed that the staff analysis seems to concur that the course developed by the Commission on Peace Officer Standards and Training seems to be appropriate for the program necessary to provide the training.

CHAIR PORINI: Okay, I see a lot of heads nodding. Who wants to take that on, on staff?

Pat?

MS. HART-JORGENSEN: This is something that is

appropriate for the for the P's and G's. And the P's and G's would be drafted to reflect the staff analysis where they discuss the fact that the training program has already been developed and that it was limited to the training time and getting the materials together for the training.

CHAIR PORINI: Okay. Any questions or comments from Members?

MEMBER BELTRAMI: Move for approval, Madam Chair.

CHAIR PORINI: Mr. Beltrami moves.

Ms. Steinmeier?

MEMBER STEINMEIER: Second.

CHAIR PORINI: We're open for discussion. Hearing --

MEMBER ROBECK: I assume that's as amended?

MEMBER STEINMEIER: As amended.

CHAIR PORINI: With the amended language, yes.

MEMBER STEINMEIER: It should be in your motion.

CHAIR PORINI: All right, so the motion before us is to adopt staff's recommendation, as amended. Motion by Mr. Beltrami; second by Ms. Steinmeier.

May I have roll call, please?

MS. HIGASHI: Mr. Sherwood?

VICE CHAIR SHERWOOD: Aye.

MS. HIGASHI: Ms. Steinmeier?

MEMBER STEINMEIER: Aye.

MS. HIGASHI: Mr. Beltrami?

MEMBER BELTRAMI: Aye.

MS. HIGASHI: Ms. Halsey?

MEMBER HALSEY: Aye.

MS. HIGASHI: Mr. Lazar?

MEMBER LAZAR: Aye.

MS. HIGASHI: Mr. Robeck?

MEMBER ROBECK: Aye.

MS. HIGASHI: Ms. Porini?

CHAIR PORINI: Aye.

MS. STONE: Thank you.

MS. HIGASHI: This brings us to item 5. This is a claim on Mentally Disordered Offenders' Extended Commitment Proceedings. This item will be presented by Staff Counsel Camille Shelton.

CHAIR PORINI: We'll give folks just a minute to get situated.

All right, Ms. Shelton?

MS. SHELTON: This test claim involves legislation that establishes civil commitment procedures for the continued involuntary treatment of persons with severe mental orders for one year following their parole termination date. Staff recommends that the Commission approve this test claim for the activities listed on page three of the staff analysis.

Will the parties please state your name for the

record?

MR. KAYE: Leonard Kaye, County of Los Angeles.

MR. APPS: Jim Apps, Department of Finance.

CHAIR PORINI: Okay, Mr. Kaye, would you like to begin?

MR. KAYE: Yes. Again, I will be brief because we agree with staff's analysis, conclusion and recommendation that is before you now.

We also would like to note for the record that we agree with staff's finding on page three of their analysis, that "...there is no evidence that the action of the District Attorney to sponsor Assembly Bill 1881 was performed on behalf of the county itself. Rather, Government Code Section 26500.5 expressly authorizes the District Attorney, on his or her own, to sponsor any project or program to improve the administration of justice," end quote.

We've also provided to the Commission declarations of a John Lounsbery of our Chief Administrative Office indicating, under penalty of perjury, that the county did not request legislative authority to implement AB 1881 or instruct the district attorney to do so on its behalf; and that the county had no position to amend, favor or oppose AB 1881.

Thank you very much.

MS. SHELTON: Just to mention, that declaration

is included as Attachment "L," Exhibit "L," page 463.

CHAIR PORINI: Any questions from Members?

MEMBER BELTRAMI: Madam Chair?

CHAIR PORINI: Mr. Beltrami?

MEMBER BELTRAMI: Do any of your elected officials ever speak for the county? Besides the board of supervisors, I'm talking about. Your parole officers, your Sheriff, your D.A., your auditor -- well, your auditor is appointed -- but whatever other elected officials you have.

MR. KAYE: I would -- not being able to defer it to anyone else at the table, I guess I would say I would assume, upon occasion, it may be construed that they may be representing the county. However, in this particular case, they clearly were not.

MEMBER BELTRAMI: No? Thank you.

CHAIR PORINI: All right, Mr. Apps?

MR. APPS: Thank you Madam Chair, Members.

We also agree with the staff analysis and would request that the Commission consider our November 6th, 2000, letter withdrawn; and that the February 1st, '99, letter be considered our official position on it -- on the matter.

MEMBER ROBECK: It sounds good.

CHAIR PORINI: All right, Mr. Robeck?

MEMBER ROBECK: I move approval of the staff analysis.

VICE CHAIR SHERWOOD: I'll second that.

MEMBER STEINMEIER: What happened to this --

CHAIR PORINI: Mr. Petersen needs to take back all of those unkind words he said about Department of Finance.

All right, we have a motion and a second to adopt staff's recommendation.

MR. PETERSEN: That was all off the record.

MEMBER STEINMEIER: It was all off the record, that's right.

CHAIR PORINI: We have a motion and a second to adopt staff's recommendation.

Is there any discussion?

Okay, hearing none, roll call, please,

MS. HIGASHI: Ms. Steinmeier?

MEMBER STEINMEIER: Aye.

MS. HIGASHI: Mr. Beltrami.

MEMBER BELTRAMI: Yes.

MS. HIGASHI: Ms. Halsey?

MEMBER HALSEY: Yes.

MS. HIGASHI: Mr. Lazar?

MEMBER LAZAR: Aye.

MS. HIGASHI: Mr. Robeck?

MEMBER ROBECK: Aye.

MS. HIGASHI: Mr. Sherwood?

VICE CHAIR SHERWOOD: Aye.

MS. HIGASHI: Ms. Porini?

CHAIR PORINI: Aye.

MS. HIGASHI: Thank you.

MR. KAYE: Thank you.

MEMBER BELTRAMI: Two in a row.

MEMBER STEINMEIER: We're on a roll here. Let's keep going.

MS. HIGASHI: This brings us to item 6.

CHAIR PORINI: Mr. Kaye, was it something you said?

MR. KAYE: This is the County of Alameda's test claim, so --

CHAIR PORINI: All right. Well, we can wait for a minute here.

MS. HIGASHI: Item 6 is the Extended Commitment Youth Authority test claim. This item will be presented by Staff Counsel Sean Avalos.

MR. AVALOS: Good afternoon.

The test claim legislation addresses changes in the procedures for the extended commitment of dangerous juvenile offenders, subject to the jurisdiction of the California Youth Authority.

Prior to the 1984 test claim legislation, when the Youthful Offender Parole Board determined that the release of a juvenile offender from the California Youth Authority posed a danger to the public, the Board was

required to petition the committing court to extend the juvenile's commitment.

Now the test claim legislation specifies that the prosecuting district attorney petition the committing court on behalf of the Youthful Offender Parole Board.

All parties, including staff, agree that counties have been reimbursed for the prosecuting district attorney's costs of representing the Youthful Offender Parole Board in extended commitment proceedings. However, claimant and County of Los Angeles argue that counties should also be reimbursed for the public defender, transportation and custody costs. Claimant supports this argument by noting that the Commission has in the past approved these costs of the test claims addressing similar extended commitment proceedings. Staff notes that the test claim cited by claimant, Mentally Disordered Sexual Offenders, Not Guilty by Reason of Insanity and Sexually Violent Predators were brand-new programs enacted after 1975. Reimbursement for public defender, transportation and custody costs under these claims is consistent with Article XIII B, Section 6, of the California Constitution and Government Code Section 17514, which requires the state to reimburse counties for legislative mandates enacted on or behalf January 1, 1975.

However, reimbursement for public defender, transportation and custody costs under the present test

claim is not consistent with the California Constitution and Government Code Section 17514. The 1984 and 1998 test claim statutes did not require counties to incur public defender, custody, or transportation costs. These activities were required by the original 1963 legislation which created the extended commitment program, and the 1971 amendment which added the right to trial.

And since these activities resulted from legislative mandates enacted before 1975, staff finds that reimbursement for public defender, custody and transportation costs should be denied.

Therefore, staff recommends that the Commission partially approve this test claim for the activities listed on listed on page 12 of the staff analysis.

Would the parties please state your name for the record?

MS. MEREDITH: Karen Meredith, Assistant District Attorney with Alameda County

MS. STONE: Pamela Stone on behalf of Alameda County.

MR. KAYE: Leonard Kaye, County of Los Angeles.

MR. APPS: Jim Apps, Department of Finance.

CHAIR PORINI: All right, Ms. Stone, do you want to begin?

MS. STONE: Yes, good afternoon, Commission Members.

We would like to thank staff very much for its draft staff analysis. We concur in its recommendation.

I would like to introduce the Assistant District Attorney Karen Meredith, who is responsible for handling these matters, and I have a couple closing remarks.

CHAIR PORINI: All right.

MS. MEREDITH: Thank you.

It's my understanding by Ms. Stone that I'm here to answer questions of the board pertaining to the proceeding; and also, especially in the area of prosecutorial discretion, as it would affect whether or not the program is mandated.

Ultimately, what my belief is, is that once we are requested by the parole board to file a petition, we at that point have no --

MEMBER STEINMEIER: Discretion?

MS. MEREDITH: All we can do at that point is to receive their request and act upon it. We're obligated by the statute at that point to review what is given to us by the parole board and file a petition if, after our review of the matter, it can be sustained. Ultimately, that review takes -- can lead to further investigation, the hiring of witnesses, or anything that we feel needs to be done in order to sustain the petition.

CHAIR PORINI: Questions?

I'm sorry, Ms. Stone?

MS. STONE: Just a very brief conclusion.

The reason why we presented this, was to make sure that your Commission Members understand that the issue of prosecutorial discretion is not equivalent to an optional program as you had in City of Merced with an eminent domain matter. The issue is to make sure that there is adequate evidence before proceeding forward so as not to impose liability for deprivation of civil rights upon the district attorney for proceeding in absence of a colorable case.

CHAIR PORINI: Questions from Members?

Mr. Kaye?

MR. KAYE: Thank you.

We, of course, concur with staff and our colleagues in the County of Alameda that the district attorney's cost is clearly mandated and, as such, reimbursable.

What I'd like to talk about briefly, is the fact that the costs -- the initial costs prior to 1975 in the Chapter 1693, 1963 statute which established this extended commitment procedure. It is true that it said that indigent defense counsel would be appointed by the superior court judge. It didn't say who was responsible for paying for that.

And I'd like to dwell for a moment on this very

critical issue, because it's our contention that we clearly were not responsible for paying for it at that point in time.

And these changes or costs were not ours. In this regard, Government Code Section 29602 appears to be dispositive. Section 29602 provides that indigent offense, custody and transportation costs are our obligation only if the following conditions are met: Namely, such costs must be incurred in the support -- and I'm quoting -- in the support of persons charged with or convicted of a crime, and committed to the county jail, and for other services in relation to criminal proceedings for which no specific compensation is provided by law," end quote.

Of course, the 1963 statute, chapter 1693, does not provide for compensation, and deals only with civil, not criminal, proceedings and with state wards, not county jail inmates. Therefore, the test claim legislation was not our obligation to pay for -- before the test claim legislation it was not our obligation to pay for, just as it is today.

And we request that the staff recommendation be amended to provide the required reimbursement for indigent defense, custody and transportation costs imposed under this test claim legislation.

Thank you.

CHAIR PORINI: Questions?

Mr. Beltrami?

MEMBER BELTRAMI: Madam Chair.

Mr. Kaye, are you saying that in '63, on, that indigent costs were not the county's responsibility? Whose responsibility were they?

MR. KAYE: The state's. And in many of these extended commitment proceedings, in that period of time -- the late '70s and so forth -- the state public defender -- like in the MBSO program, was actually appointed by the judge.

In other cases, we had large billing programs that would actually invoice the state, in civil matters, where it wasn't a normal criminal proceeding, where it was not our county charge.

CHAIR PORINI: Mr. Robeck?

MEMBER ROBECK: I'd like staff to comment on that.

CHAIR PORINI: Sean?

MR. AVALOS: It seems clear to me that this test claim only addresses the duties of the district attorney, therefore, reimbursement is for the costs imposed upon the district attorney and the counties for representing the Youthful Offender Parole Board.

Prior to this test, it didn't even address the duties of the Public Defender cost and transportation costs. Those weren't even the subject of this test claim.

Even if you were to amend those in to become subject of this test claim, it would predate 1975, which is not even in the universe of mandate reimbursement.

CHAIR PORINI: All right, Mr. Apps?

MR. APPS: Thank you.

We, again -- and this hurts to say this -- we support the staff's analysis.

MEMBER STEINMEIER: Did you say pains you to say it? What did you say?

CHAIR PORINI: I think we just hit a jackpot here.

MEMBER BELTRAMI: You've really mellowed since you've retired.

MR. APPS: I don't think we -- no.

Seldom have we supported this many test claim approvals in a single hearing. But this is a great claim. We support the staff analysis as currently structured.

Thank you.

CHAIR PORINI: All right. Questions, comments from Members?

Motion?

MEMBER LAZAR: I'd make a motion to adopt the staff analysis.

VICE CHAIR SHERWOOD: Second.

CHAIR PORINI: All right, we have a motion and a second.

Discussion?

Roll call?

MS. HIGASHI: Mr. Beltrami?

MEMBER BELTRAMI: Yes.

MS. HIGASHI: Ms. Halsey?

MEMBER HALSEY: Aye.

MS. HIGASHI: Mr. Lazar?

MEMBER LAZAR: Yes.

MS. HIGASHI: Mr. Robeck?

MEMBER ROBECK: Yes.

MS. HIGASHI: Mr. Sherwood?

VICE CHAIR SHERWOOD: Yes.

MS. HIGASHI: Ms. Steinmeier?

MEMBER STEINMEIER: Aye.

MS. HIGASHI: Ms. Porini?

MEMBER PORINI: Aye.

Thank you.

MS. STONE: Thank you very much.

CHAIR PORINI: Thank you.

MS. HIGASHI: This brings us to item 8, another test claim.

CHAIR PORINI: Let's wait just a moment.

MEMBER STEINMEIER: Hang on, we have to change our binders.

MS. HIGASHI: You're right. I have to change my binder, too.

Okay. We're now up to item 8. For item 8, we have one participant who has not been sworn, so why don't we start with that?

CHAIR PORINI: All right, Mr. Bell?

MS. HIGASHI: Do you solemnly swear or affirm that the testimony you are about to give is true and correct, based on your own personal knowledge, information or belief?

MR. BELL: I do.

MS. HIGASHI: Thank you.

CHAIR PORINI: Staff?

MR. AVALOS: The test claim legislation requires schools districts and county offices of education to disclose information regarding the funding of employee benefits when providing retirement health and welfare benefits to their employees, self-insuring workers' compensation claims or advising budgets due to new collective bargaining agreements.

The Commission must address two issues to determine whether the test claim legislation imposes a reimbursable state-mandated program.

First, the Commission must decide whether the test claim legislation is subject to Article XIII B, Section 6, of the California Constitution. To do this, the Commission must decide whether school districts and county offices of education are required to provide retirement

health and welfare benefits and whether they are required to self-insure workers' compensation benefits.

Staff finds that the activities concerning the disclosure requirements for retirement, health and welfare benefits provided to employees prior to the enactment of test claim legislation and disclosure requirements for budget revisions are subject to
Article XIII B, Section 6, because school districts and county offices of education must continue to provide retirement, health and welfare benefits at least into the terms of the preexisting contract terminated by good faith collective bargaining.

However, staff finds that the activities concerning the disclosure requirements for self-insurance of workers' compensation benefits are not subject to Article XIII B, Section 6, because school districts and county offices of education are not required to self-insure workers' compensation benefits.

Second, the Commission must decide whether the test claim legislation constitutes a new program or higher level of service.

One of the primary activities imposed by the test claim legislation requires school districts and county offices of education to provide an actuarial report regarding retirement benefits. Staff finds that the requirement for school districts and county offices of

education to produce an actuarial report does not constitute a new program or higher level of service, to the extent that school districts and county offices of education are already required to produce an actuarial report under the State Controller's audit guide.

However, staff finds that except for performing an actuarial report, all the test claim activities concerning retirement, health and welfare benefits and budget revisions constitute a new program or higher level of service within the meaning of Article XIII B, Section 6, of the California Constitution, and impose costs mandated by the state pursuant to Government Code Section 17514.

Therefore, staff recommends that the Commission partially approve this test claim for the activities listed on page 18 of the staff analysis.

Would the parties please state your names for the record?

MR. PETERSEN: Keith Petersen, representing Clovis Unified School District.

MR. BELL: Jeff Bell, Department of Finance.

CHAIR PORINI: All right, Mr. Peterson, would you like to begin?

MR. PETERSEN: Certainly. Thank you.

This test claim has three parts.

As you know, the first part is disclosure of

collectively-bargained post-retirement benefits, health insurance, that sort of thing, for retired school district employees.

The second issue is workers' compensation, test claim level of disclosure but for a different reason. Actuarial report, future cost of self-insurance.

And the third part is disclosure of some other collective bargaining information, to which I believe there is no dispute.

I've got three issues to address, and these are not interrelated, so we can go in any order you'd like. I have an issue regarding the statement of law regarding future collectively-bargained agreements.

The second issue has to do with the scope of reimbursement on the actuarial reports.

And the third, which I'd like to take first, is why isn't the disclosure of workers' compensation reimbursable.

Taking that issue first, the staff analysis correctly points out that the Labor Code requires all businesses in California to have some sort of worker compensation insurance. That's not a reimbursable state mandate, and we're not requesting reimbursement for workers' compensation insurance.

We have a problem with the next stage. The next stage of the Labor Code essentially gives you two choices.

You can buy insurance or you can self-insure. I've been informed and I believe that buying self-insurance is for a large governmental agency much less costly than buying -- excuse me, being self-insured is much, much less costly than buying an insurance plan. So we have a situation here where one of several school districts elected to self-insure at some point in time. And then later on, as time passes on, the Education Code adds a section requiring that if you do choose to be self-insured, you have this additional level of disclosure. You have to do this actuarial report. So the situation is, we have a government agency deciding to take the less-costly method of self-insuring, which it's allowed to do in the Labor Code; and then later being asked because you did that, you have just a little bit more disclosure, future costs of current cases, that sort of thing.

Now, the staff analysis is following the posture that this Commission staff has taken for the last two or three years, and that is, if somewhere in the stream of mandates there's a decision point and you have the power of making a choice, that obviates -- as a general matter -- that obviates reimbursement for anything that happens afterwards.

I don't think it's logical for anybody to conclude that if you're required to have insurance and there's two ways to do it, that choosing one of the two

ways is discretionary, in the sense that you lose reimbursement for something else that you didn't even know existed at the time comes along and says, "This is something you have to do because you chose to be self-insured."

In other words, you made that decision at one point in time; and then years later, because you made that decision, you're asked to do additional disclosure. The fact that you could choose one of two required methods is not a choice, in the sense that you can't -- you've got to have insurance. That's not the choice. You just have a choice of two methods, and they picked the cheaper method, and later on they were asked to, in a different code -- not the Labor Code -- in the Ed. Code they were asked to disclose some information because they made that choice.

Again, the staff is taking the position they had for several years and that is, again, if there's some choice in there somewhere, that means it's no longer a "shall" or a reimbursable because you made a choice.

In the staff analysis, page 15, they dispose of this entire issue in a footnote, Footnote 29. This issue dates back to a case called the City of Merced, which we argued for several years. It's gotten to the point now where staff doesn't even cite the law; they just treat it as a given, that "discretion" means no reimbursement, down the line.

First of all, I think it's dangerous for them to reach a point where they don't even cite the law anymore -- they just take it as a given -- I would like them to continue citing City of Merced even though it's a depublished case. They can go on citing it. And that they not dispose of these things in footnotes when it's an issue of reimbursement.

And second today, I'd like you to agree with the logical absurdity of there being any discretion at all and the concept of having workers' compensation. They chose the cheaper method, and they were asked later to do the actuarial disclosure. That's one of my issues.

The second issue -- my first one was the collective bargaining. The staff has agreed that collective bargaining contracts in force, as of January 1995, cannot be impacted by subsequent legislation. So they are agreeing to reimbursement of the disclosure costs of post-retirement benefits from those contracts.

There's a great deal of the discussion from the Department of Finance that these things were collectively bargained, therefore, it can't be mandated. The staff came down, intuitively, actually indicating that once bargained, you can't back out of it.

I've provided some information -- it's a late filing. I'm sorry, it took me a while to get a hold of it. But essentially it cites several laws that supports the

staff's position that you cannot unilaterally withdraw benefits conferred on government employees. It has to be a mutual agreement.

So I agree with the staff on the fact that existing contracts in 1995 have to be reimbursed for disclosure. And since that persists as long as the retirement benefits are paid out, you're talking several decades, in some cases. The question I have is -- and maybe I missed it -- but I cannot find anything in the staff analysis that addresses these benefits which result from bargaining -- excuse me, contracts bargained after 1995. There's no statement in the staff analysis that I can find treating that. And it will come up, especially in the P's and G's stage.

If you have a collectively-bargained contract that's signed after 1995, what's the treatment? Is it reimbursable or not reimbursable?

MEMBER STEINMEIER: That's a good question.

MR. PETERSEN: So I think that has to be addressed.

CHAIR PORINI: Staff?

MR. AVALOS: In writing, I guess I did have the assumption when I wrote this that they wouldn't bargain away their rights to retirement, health and welfare benefits. But if they did bargain away their rights to retirement, health and welfare benefits to the point where

disclosure requirements were not required, then it wouldn't be a mandate. But I think the assumption exists that they wouldn't do that.

MR. PETERSEN: Well, your own analysis said they wouldn't disagree with the concept of bargaining of rights. Your analysis said that collective bargaining is a mandate. So I think there should be no distinction between pre-'95 and post-'95, in that sense. This is just post-'95 is not addressed in the staff analysis.

MR. AVALOS: If they were to bargain away their rights for retirement, health and welfare benefits, there would be no disclosure requirements necessary.

MR. PETERSEN: But they bargained the rights before '95 -- your own staff analysis says to the contrary.

MEMBER STEINMEIER: What page, Mr. Petersen, are you --

MR. PETERSEN: I'm trying to find that now.

That was --

MS. HIGASHI: Keith -- Mr. Petersen your recollection are you addressing new contracts?

MR. PETERSEN: After 1995.

MS. HIGASHI: After 1995? Not the ones that were in existence prior --

MR. PETERSEN: Right.

MS. HIGASHI: -- to the test claim --

MR. PETERSEN: And I don't think the analysis

covers post-'94 contracts.

MS. HIGASHI: The analysis appears to be very limited to --

MR. PETERSEN: Pre-'95.

MS. HIGASHI: Right.

MR. PETERSEN: Okay. But there are some districts that may have done this post-'94. And the test claim is silent as to whether that disclosure is reimbursable or not.

I just can't assume that it's not. It has to be treated somewhere.

So I think that the test claim analysis has to be amended to cover post-'94 contracts. Whether you say "yea" or "nay" I think has to be amended.

The last issue is actuarial reports. And this one is kind of tricky. Let me find the page.

The statute requires an actuarial reported by the American Association of -- what do they call it -- Actuarialists or something -- American Academy of Actuaries. And it requires several activities to reach that report. The staff analysis subtracts from that a few of the activities based on a section of the 1994 audit manual. It does this in two sentences. Let's see, it's on my 16. It's under the section, "Production of an Actuarial Report," page 16.

The second paragraph, under, "Production of an

Actuarial Report." "The staff partially agrees with DOF's position and finds that under prior law, school districts were required to produce an actuarial report. Staff reached this conclusion after referring to the State Controller's 1994 Audit Guide."

Section 475 of the guide states, "Retirement benefits should include among other things actuarial disclosures."

Without discussing the merits of that conclusion, procedurally, for that conclusion to work, the staff has to declare the audit guide a mandate.

Are you willing to do that?

MS. HART-JORGENSEN: If I may?

MR. PETERSEN: At least that section.

CHAIR PORINI: Ms. Hart?

MS. HART-JORGENSEN: Wasn't that covered in one of the prior claims that you were talking about, the package of claims that we had for the -- I think, didn't the Commission already find that this was a mandate? This is one of the claims that you had.

MR. PETERSEN: Well, this isn't one of mine. It's financial compliance audits.

MS. HART-JORGENSEN: Yes.

MR. PETERSEN: To make this work in this opinion, you've got to find that at least that section of the audit guide a mandate. Are you doing that?

MR. AVALOS: That was my understanding, in referring, with another colleague that was already done, that the guide was considered a --

MR. PETERSEN: The 1994 Audit Guide was a mandate?

MR. AVALOS: It was used in, I think, 97-TC-19, and 97-TC-20, it was addressed in those test claims.

MEMBER STEINMEIER: In general.

MR. PETERSEN: Yes, I just want to understand because it will be important later.

MEMBER STEINMEIER: He can use it later.

MR. AVALOS: That's my understanding.

MR. PETERSEN: So whatever the audit manual is, you're subtracting from the code section, it's because you found the audit manual to be a preexisting mandate?

MR. AVALOS: I was -- they were required to do that before this test claim based on the audit guide.

MR. PETERSEN: Okay, then --

CHAIR PORINI: Ms. Jorgensen?

MS. HART-JORGENSEN: If I can -- whether or not it was a mandate or not, I think you compared what was in existence before. And if you look at the law, the way we look at mandates law, we look to see what the law was prior to the enactment of the test claim legislation. Prior to enactment of the test claim legislation, there was this guideline, whether or not it's deemed to be a mandate or

not. But it seems to be that was the requirement. Therefore, they're looking to see if the test claim legislation is a new program or higher level of service, a greater burden to comply with it. So it was for that purpose that staff compared it; and also it was brought up. It was addressing the allegations set forth by the Department of Finance, and addressing the fact of the actuarial reports.

MR. PETERSEN: Well, for something to be a requirement, it has to be a law, statute or executive order, which makes it a mandate.

The second issue, of course, is whether it's reimbursable. I'm not asking that question today. I'm just asking if you're declaring that a legal requirement.

MEMBER STEINMEIER: An executive order.

MR. PETERSEN: Are you declaring the audit manual a legal requirement?

MR. AVALOS: When I subtract it, this activity from this test claim, I was going on the premise with comments made by the Department of Finance, and them saying that this was already required of them prior to the test claim in order for them to do a complete and proper audit. In order for them to have the records available for a complete and proper audit. Otherwise, their audit would be incomplete and they would be somehow penalized or somehow scrutinized because of that.

MR. PETERSEN: Yes, I know. I understand that.

MR. AVALOS: But I guess I did treat it in the level that it was a mandate.

MR. PETERSEN: Yes. But to subtract something from a current mandate, you have to subtract a prior mandate.

MR. AVALOS: Right.

MR. PETERSEN: A prior legal requirement.

MEMBER STEINMEIER: Uh-huh.

MR. PETERSEN: So you're saying here today that the audit manual is a legal requirement upon school districts?

CHAIR PORINI: Ms. Jorgensen?

MS. HART-JORGENSEN: I think as we've indicated before, it was in a prior test claim as to this issue that the Commission had looked at the document to see if it was a mandate. And I believe this is one of the activities that was already found to be a mandate in that prior test claim that was heard just a few months ago. So if you want to limit it to just that area, it appears to me that the Commission itself found that to be a mandate, part of that audit guide.

MR. PETERSEN: So you're saying this section is a mandate or the audit guide in total is a mandate for this claim?

MS. HART-JORGENSEN: We're saying, as we look at

this, the Commission did find that portions of that audit guide constituted a state mandate.

Sean --

MR. PETERSEN: I understand that, but it's not cited in here. You haven't got any legal basis for this conclusion.

MS. HART-JORGENSEN: There was a -- it was comparing existing law -- or comparing the requirements that were there.

What is it that you're asking the Commission to find, specifically?

MR. PETERSEN: If you're saying in this test claim that this section of the audit manual, or the audit manual itself is legally binding upon school districts -- a legal requirement to do what it says in the audit manual.

MR. AVALOS: I must admit, when I did write this, I was deferring to the Department of Finance because I'm not an expert in this area. So when they pushed -- when they brought comments --

MR. PETERSEN: Nor are they. It's the State Controller's Audit Manual.

MR. AVALOS: Right. But it was their comments that said they had to do so. This was a preexisting program. I deferred to their knowledge in this area that it was a preexisting requirement. But I was deferring to them. So I think it's better that the Department of

Finance addresses this also.

CHAIR PORINI: Mr. Robeck, did you have a question?

MEMBER ROBECK: Oh, I had a comment about the audit guideline. I think the audit guideline is drawn up with the consent of the Department of Finance, as we well know. And the position of the Controller and the Department of Finance has always been that the audit guideline reflects the requirements of current law and does not make law. Is that -- that's been the position.

MR. PETERSEN: So we're saying in this test claim that the audit manual is the legal requirement upon school districts, at least this section?

CHAIR PORINI: Mr. Sherwood?

VICE CHAIR SHERWOOD: Along that line, in current law, what if we have some of the laws go back prior to '75, or into the sixties and fifties that led to creating this?

MR. PETERSEN: Yes, that, of course, is in the next step. And I didn't want to address the issue of reimbursement. I just want to be told whether it was a legal requirement of school districts.

VICE CHAIR SHERWOOD: It could be -- it comes back to the Controller's offices -- legal requirement and finance; but that a legal requirement based on statutes that may have came into play before '75.

MR. PETERSEN: But, you know, and I don't

want to sandbag you. The ultimate issue is it's not a Title 5 regulation; it's a manual. And it's not quite an executive order, unless you people say it is. And if you're saying that today, that will be quite useful to us in other locations.

MEMBER STEINMEIER: That's an excellent question. Is it an executive order or not?

MEMBER HALSEY: I believe it's just guidance to help them --

CHAIR PORINI: We actually heard this issue before.

MS. HIGASHI: Yes. The issue has been before the Commission. The Commission has made findings regarding the audit guides, and the Commission has made reimbursable mandate findings based on some audit guide provisions.

MR. PETERSEN: And to the contrary, they've tossed out advisories that they said were not executive orders. So I was hoping for something clear-cut today.

MS. HART-JORGENSEN: And if I may address, I think we were talking about the other advisories before in the other test claim that is not the test claim that is before us right now. They were CDE advisories. It was not an audit manual. It was CDE advisories. In fact, they even had caveat language that they were not to be considered as an executive order, that they were for advisory purposes only. And, again, those were set forth

by the CDE, not by the State Controller's Office.

MR. PETERSEN: I think it would trouble one other constitutional officer to find that you treat their different advisories differently.

So we're in a quagmire, is why I raise the point.

MEMBER STEINMEIER: It's a good point, though.

CHAIR PORINI: Do you want to continue on?

MR. PETERSEN: Well, if you adopt the staff recommendation, I guess I'll have an answer.

And the other issue I had, of course, was that the post-'94 collectively-bargained contracts. So those are my three little blockbuster --

CHAIR PORINI: All right, questions?

Ms. Steinmeier?

MEMBER STEINMEIER: What about the actuarials? Many school districts have chosen to use self-insurance; sometimes tiered with a JPA might be the next kick-in. I think we actually have three --

MR. PETERSEN: Catastrophic coverage, yeah, the whole bit.

MEMBER STEINMEIER: Right. Self-insurance, and then if that runs out, then you go to a JPA, and then there's some state pool you're in.

MR. PETERSEN: Yeah.

MEMBER STEINMEIER: Does the cost of doing this actuarial report either wipe out the savings benefit from

being self-insured? Or how significant is it? I have no clue what they --

MR. PETERSEN: My personal experience in San Diego Unified -- and this is dated by several years -- in San Diego Unified School District, it's hundreds of thousands of dollars difference. And I think -- while we have been discussing this claim over the past years, I think people have been kicking around the number of six to nine thousand dollars for the study. That may have been the amount that Clovis actually paid for a study, which is why it sticks in my head.

MEMBER STEINMEIER: But you don't know how that stacks up against the cost of going out and buying, you know --

MR. PETERSEN: Well, San Diego Unified, when I was working there, if they had bought an actuarial study, they paid 25,000 dollars against hundreds of thousands of dollars in savings.

MEMBER STEINMEIER: So they're still saving money? A substantial amount.

MR. PETERSEN: Enormous amounts of money.

MEMBER STEINMEIER: But it is a business decision, and it could be theoretically changeable, although it would depend on -- if you were in a JPA, it would depend how tightly that was written, and you may not be able to opt out without sufficient notice.

MR. PETERSEN: After making the first --

MEMBER STEINMEIER: Commitment.

MR. PETERSEN: -- decision to self-insure?

MEMBER STEINMEIER: Right. How reversible is it?

MR. PETERSEN: I don't know that.

CHAIR PORINI: Okay, Mr. Beltrami?

MEMBER BELTRAMI: Do school districts use the State Comp. Insurance Fund?

MR. PETERSEN: I'm not certain. I'm not an expert in this area, but I think some of the smaller ones might, where it's -- when you self-insure, I know for a fact that you have to staff the effort, you have to do your own claims review. And I can't see how that -- I'm just assuming, speculating how that would be cost effective for a very small district.

MEMBER BELTRAMI: Why do you think we have this distinction between self-insurance and --

MR. PETERSEN: Why is it in the law?

MEMBER STEINMEIER: Uh-huh, choice?

MR. PETERSEN: I think it's in there because if you buy insurance, you have a third party estimating your liabilities, future liabilities. I'm guessing if you self-insure, you're making your own estimate, so that's worthy of public disclosure, in case you have an insurance agent on your board.

MEMBER BELTRAMI: Why the reporting requirement?

MR. PETERSEN: So you disclose what you think your future liabilities will be.

MEMBER BELTRAMI: I'm not sure what value there is in that legislation.

MR. PETERSEN: Well, I can't get to that issue, whether the mandate's valuable or not. But if you've got cases going, you're supposed to cost out what you think they're going to cost in the future and disclose that.

MEMBER BELTRAMI: Right.

MR. PETERSEN: And I assume if you have insurance, they do that for you.

CHAIR PORINI: All right, other questions of Mr. Petersen?

Mr. Bell?

MR. BELL: Good afternoon. Thank you very much.

Regarding the comments of Mr. Petersen on the -- in breaking it down in the three areas that he broke down; in the first area, regarding self-insuring workers comp., we concur with the staff analysis.

On the larger issue of retirement benefits or health benefits for retirees over the age of 65 and the reporting requirements associated with it, we think it's important to determine to what extent providing those benefits is a state mandate or not. And this is a very important distinction because as we looked at the code, we did not find anywhere where the provision of health

benefits to retirees over the age of 65 is required by state law.

CHAIR PORINI: It's not.

MR. BELL: The point here is that if a district has chosen to provide those benefits to retirees over the age of 65, that was a choice at the local level. It was not a state requirement.

Since that is the case, we believe any costs associated with providing those benefits are not subject to the costs mandated by the state as defined in Government Code Section 17514, or XIII B of the Constitution.

Since the provision of the benefits is not mandated in its inception, we believe the reporting requirements associated with providing these benefits, as required, are not mandated tasks. Rather, they are the rules districts must follow if they provide these optional benefits packages.

We also point out that the legislative change resulting in reporting requirements for an optional program doesn't somehow convert the program into a state-mandated program, nor does it require provision of a higher level of service.

And finally, we would note that even if a district is going to have to go through the collective bargaining process to either no longer offer the option to non-vested future retirees or any other area they want to

negotiate regarding those health benefits, simply the fact that they might have to go through the collective bargaining process to do that does not change that benefit into a state-mandated benefit.

So in conclusion, we believe all the costs associated with this test claim result from a local decision to provide an optional benefit. There is no state requirement to provide it; and, thus, we do not believe it generates state-mandated costs.

CHAIR PORINI: All right, questions?

Ms. Steinmeier?

MEMBER STEINMEIER: I have one for Sean.

To the point that Mr. Petersen was making about post-1995 contracts, would you change the language of your recommendation to reflect that or do you think what we have here is clear enough, that people would realize in the process that claiming after that is fine, as long as we don't change the -- we don't downscale the benefits over time?

MR. AVALOS: I thought it was clear. That's what my intention was.

MEMBER STEINMEIER: Your intent?

MR. AVALOS: The benefits continue on until they're bargained away.

MEMBER STEINMEIER: Right.

MR. AVALOS: So every year, two years or three

years, whenever the contract is negotiated, those benefits are going to continue on. And only if that next contract negotiation period --

MEMBER STEINMEIER: Reduced them?

MR. AVALOS: -- do they negotiate their benefits away, which I don't foresee happening. But if they were, that would be an instance when they wouldn't provide it.

But it's not like separate contracts every two years. They just kind of flow together and they continue on.

MEMBER STEINMEIER: Yeah, the reality is they're rolled from one to the other, and usually scaled up, and never down.

Okay, then understanding that, I'd like to move the staff recommendation.

CHAIR PORINI: Mr. Sherwood?

VICE CHAIR SHERWOOD: One question. I've got to go back to this audit guide and get the question that Keith brought up. And I'm not sure we've --

MEMBER STEINMEIER: Answered it?

VICE CHAIR SHERWOOD: -- really answered that question.

And, you know, if I go to page 16 and I look at what the staff had written up, on production of an actuarial report halfway down, and then maybe we go halfway down that paragraph "To support this position, DOF cites

the SCO audit guide. DFO states that this audit guide is in accordance with Generally Accepted Accounting Principles -- GAAP -- which is based upon standards provided by FASB 106. And DOF states that FASB had been in place since 1992."

Well, now, FASB, these are principles. They're not really statutes. That's where I'm getting confused here because this gets back to what Keith is saying. You can probably operate as a financial entity outside of FASB, but you're going to pay a high price to do it. You're going to be excommunicated from the financial industry, basically. You won't get loans -- da, da, da.

MEMBER STEINMEIER: Right.

VICE CHAIR SHERWOOD: So it's going to be very difficult to do that. But I don't --

MR. PETERSEN: It's not a "shall."

VICE CHAIR SHERWOOD: That's a problem for me. What I'm getting back to --

MR. PETERSEN: Well, what this has done is --

VICE CHAIR SHERWOOD: -- is, do we need to address this question in a little more detail?

MR. PETERSEN: Yes, I think they've opened a can of worms that they thought they had hammered down a while ago.

VICE CHAIR SHERWOOD: That's my concern.

CHAIR PORINI: So it sounds like maybe we ought

to, in caution, hold this item over, get some clarification in these areas, and then bring it back.

MEMBER STEINMEIER: On the actuarial? Just on the actuarial report? Is that all we're limiting it to?

VICE CHAIR SHERWOOD: That's my concern.

CHAIR PORINI: Yes.

MR. AVALOS: What would the direction be necessary for staff? Because whether it's -- I don't know if that's a decision the Commission needs to make, whether the audit guide is a reimbursable state mandate or not. I don't know.

CHAIR PORINI: Well, I think we need some discussion within the document to kind of walk out what has happened with regard to the audit guide and where we're going here, so we're very clear.

MEMBER BELTRAMI: How long have you --

MEMBER HALSEY: Can we have some guidance as to whether it's law or guidance?

VICE CHAIR SHERWOOD: And can we use it, and does it make sense?

MEMBER BELTRAMI: How long has the audit guide been around?

MEMBER STEINMEIER: In existence? A long time.

CHAIR PORINI: A long time.

MEMBER BELTRAMI: And I'm sure it's based on the legislation that --

UNIDENTIFIED SPEAKER: But it changes everything.

MEMBER BELTRAMI: -- the constitutional legislation that sets up the Office of the Controller.

VICE CHAIR SHERWOOD: See, I'm sure, but I'm not --

MEMBER STEINMEIER: Only generally.

VICE CHAIR SHERWOOD: I mean, if that's true, that's fine, but --

MEMBER BELTRAMI: Well, generally, you have to carry out your function.

Yes?

VICE CHAIR SHERWOOD: You know, I haven't -- it hasn't been shown to me, Al, that it is based on that.

MEMBER BELTRAMI: Okay.

VICE CHAIR SHERWOOD: Because I know there's also a general association of accounting principles, and some of these are nationwide.

MR. PETERSEN: It used to be 20 pages long; now it's over 400.

MEMBER BELTRAMI: Yeah.

MEMBER STEINMEIER: Slightly more complex.

CHAIR PORINI: Okay, so if that's -- do you have enough direction, Sean?

MR. AVALOS: Yes.

CHAIR PORINI: All right. So we'll hold the item over. Thank you very much.

MEMBER ROBECK: Just for clarity, are you addressing whether the 1994 Audit Guide is an element of your recommendation, of your findings?

MR. AVALOS: What I think I need to address is -- the question that needs to be answered is whether or not, based on the research I'm going to have to do, is whether or not the audit guide is considered an executive order and a state mandate. And if it is, then the staff analysis will remain the same. If it's not, then I'm not going to be able to subtract out the cost of the audit. I mean, that's how it would fall. Either it's a mandate and --

MEMBER STEINMEIER: It's not.

MR. AVALOS: -- the cost of the actuarial report is subtracted; or it's not, and the cost of the actuarial report is left in.

MS. HIGASHI: There's also the added issue of adding references into the prior test claims, which included the audit guides as part of the test claim, which meant that they were filed as executive orders. And the Commission previously addressed those.

MEMBER STEINMEIER: To be consistent.

MEMBER BELTRAMI: So we'll continue this?

CHAIR PORINI: We'll continue this to next month. Thank you.

MS. HIGASHI: So this analysis would be revised

and expanded in this section.

MEMBER BELTRAMI: Nine is done. Ten is done. Eleven is done.

MS. HIGASHI: Items 9, 10 and 11 are postponed.

MEMBER BELTRAMI: Nine, ten and eleven?

MS. HIGASHI: Uh-huh.

MEMBER BELTRAMI: So we're at 12?

MS. HIGASHI: And this brings us to item 12, Proposed Amendments to Parameters and Guidelines, the Open Meetings Act. This item will be presented by Shirley Opie.

And let me just add as clarification, this is Parameters and Guidelines now, so we don't need to swear witnesses in.

MS. OPIE: Good afternoon.

The County of Los Angeles submitted a proposal to amend the Parameters and Guidelines to simplify the reimbursement process for Open Meetings Act costs. The Proposed Parameters and Guidelines, as modified by staff, allow eligible city, county and special district claimants to choose one of three reimbursement methods for Open Meetings Act costs.

The first method would allow reimbursement for actual costs.

The second method would allow claimants to use a standard time that would be multiplied times the number of agenda items, times the productive hourly rate of the

employees involved in the agenda preparation.

The third method would allow claimants to claim a flat rate of 100 dollars for each meeting.

School and community college districts would also have the option of claiming actual costs of standard time or the flat rate. The standard times for agenda items would be based on enrollment.

The county developed the proposed standard times based on samples of Open Meetings Act reimbursement claims filed by cities, counties and special districts with the State Controller's Office. The standard times for the school districts is based on data collected by the Education Cost-Mandated Network and San Diego Unified School District.

Two late filings were received. One is a letter from the State Controller's Office that suggests amendments to clarify the calculation of indirect costs. And the Controller's recommendations have been incorporated into the Parameters and Guidelines. That letter is basically just a confirmation of discussions with staff.

And the second late filing is from Girard and Vinson, requesting that the Commission adopt the unit time allowances suggested in their correspondence of September 6th. And in that letter, Girard and Vinson recommends that the allowances for school districts with enrollments of 10,000 to 19,999 be increased from

15 minutes to 35 minutes per agenda item. And in those school districts with less than 10,000 be increased from ten minutes to 25 minutes.

The Commission's regulations encourage the use of uniform costs. Therefore, staff recommends that the Commission adopt the county's proposed amendments to the P's and G's, as modified by staff.

Will the parties please state their names for the record?

MR. KAYE: Leonard Kaye, County of Los Angeles.

MR. BURDICK: Allan Burdick. on behalf of the California State Association of Counties.

MR. MINNEY: Paul Minney with Girard and Vinson on behalf of Mandated Cost Systems.

MR. ZEMITIS: Cedrik Zemitis, Department of Finance.

CHAIR PORINI: All right, Mr. Kaye?

MR. KAYE: Thank you.

We certainly agree with the Commission staff analysis and their recommended version of the P's and G's amendment before you today, including all of the standard times.

I would like just to briefly comment that the development of the standard times was done -- and it only could have been done with the express and very vigorous cooperation of the State Controller's Office and the

various other state agencies, as well as all the claimants, including a large body of the schools.

And that everyone -- I was just given a copy by Paul Minney -- supports the idea that the amendment include a unit time allowance because we're all in favor of this concept.

Our study was limited to actual claims filed. We just looked at '95-96; and I believe schools of the Education Cost Mandated Network also used computer printouts provided by the State Controller's Office. It was a very defined population. It was a very exacting random sample that was selected. And we didn't necessarily like the numbers that we counted. But we're not suggesting that we recount that now or redo it. However --

MEMBER ROBECK: Like Florida?

MEMBER STEINMEIER: No more counting.

MR. KAYE: But I don't want to comment on anyone else's methodology. I'd just like to urge you to adopt these times. They're very, I think, fair; and they were done in a scientific method.

And I would just like to reserve any opportunity to comment, without commenting on anyone else's methodology at this time.

Thank you.

CHAIR PORINI: All right, Mr. Burdick?

MR. BURDICK: Chair Porini and Members of the Commission, Allan Burdick, on behalf of the California

State Association of Counties.

What I'd like to do is I'd like to urge you to take action on this claim today either as it was submitted, or if you're convinced with the amendment by Girard and Vinson, to include that.

This is an item that has been worked on by state and local government now for about seven years. And the importance of this particular date is that the filing date for annual claims is January 15th. And you will not be meeting again until after that date. And so if you do not take action today, that will mean there would be no direction to those people who are currently preparing their claims as to whether this may be an option for them in the future or not, or whether they should spend time now going through and documenting their actual costs that they have in preparing their claims and taking some additional time.

So what I'd like to do is to urge you to take action.

I do believe that probably the statistics by Girard and Vinson probably do more accurately reflect the actual time of the smaller school districts. But in concurring with Mr. Kaye, we have been dealing with this for a long period of time. There's been ample opportunity for everybody to participate. I, too, feel that, you know, some of the times probably are understated.

In this case, if you took action without doing

it, you would only lose one fiscal year, if you were going to come back and request amendments, and that would be the '97-98 fiscal year. And that's why I suggest that we move today and not put this item over.

So either way, I would say that if you feel that the testimony from Mr. Minney is convincing, I would urge you to adopt it and to adopt those amended staff Parameters and Guidelines. If not, I would urge you to adopt the Parameters and Guidelines, as presented, and urge you not to put this matter over and continue this.

Thank you.

CHAIR PORINI: Mr. Minney?

MR. MINNEY: Thanks for the set-up.

Commission Members, Madam Chair, I handed out before you today, it's just a one-page summary of the arguments which I have previously submitted before the Commission and served on interested parties to this matter.

What I wanted to do was reemphasize this argument here today because I felt that the staff had misinterpreted what we had tried to do in one of our filings, that was the September 6th filing, where we had regenerated some of the information and looked more at the current filings to show that the smaller school districts' standard unit time allowance was too low.

First and foremost, I do. What we want to say

here -- stand here today and say we support the unit time allowances. I think they are in the best interest of all parties; and probably reduce costs to the state for filing of claims.

So we, too, want to encourage you to take action on this claim today.

However, that being said, my position for increasing the unit time allowances for the smaller school districts is based on the following, and I'll be following the material I handed out on the first page. The data that was used by EMCN to generate the proposed unit time allowances was taken from the '95-96 fiscal year.

As you are all probably very well aware, at that time this claim was under very heavy scrutiny by the State Controller's Office, as per legislative mandate. And the State Controller had issued a number of directives to school districts that they were only going to allow a small fraction of costs to be incurred under these claims. So the claims filed in '95-96 were filed under the overly-restrictive guidance of the State Controller.

Claim preparers such as my client, who represents a large number of school districts in the state, heeded that example and filed the claims that were much smaller than they felt were probably allowed for under the Parameters and Guidelines.

Obviously, we got clarification regarding this

process from the Commission when it reviewed the IRC on the OMA, Open Meetings Act, claim from San Diego later, last year and earlier this year, where the Commission pretty much concluded that limiting the time of all the employees involved incorrectly reduced the claim. Therefore, for a lot of school districts, the prior claims had either been inappropriately limited or, in my client's case, they had filed them inappropriately because they had reduced the claims to meet the Controller's mandates.

Therefore, looking at this year's fiscal data Mandated Cost Systems, which has over 680 school district clients and using EMCN's methodology recalculated the amounts for the two smaller districts. And if you look at the bottom of the page, the average of -- the average time per agenda item moves up significantly for smaller districts: From ten minutes to 25 minutes for those with enrollment of less than 10,000; and from 15 to 35 minutes for those districts from 10,000 to 20,000, essentially.

My concerns for approval today, if adopted as currently drafted without these changes, is that it pretty much forces Mandated Cost Systems to file 680 school district claims using actual cost, really pretty much defeating the cost savings that we had achieved by standard rates. They've looked at the '99-2000 data and compared it to the unit times presented here and decided that in almost every case, they're going to have to file actual costs.

That, of course, as indicated in the second bullet, which increased the mandated reimbursement claim for this program and pretty much vitiated or defeated the purpose.

I just wanted to point out by way of further example, in the material that's submitted in the attachment is the analysis that we did and EMCN did for determining the rates. But if you look at just, for example, the proposed rates, the difference between a 19,000-enrollment district is 15 minutes and a 21,000-enrollment district is 45 minutes. That's, obviously, a 30-minute difference for, you know, a difference between a couple thousand kids.

I don't think there is that much of a difference between those two sizes of districts. And, again, that would support the position I think the smaller districts ought to be brought up.

Again, I'll reserve a little bit of time to respond to anything the Department of Finance may have to say.

CHAIR PORINI: Any questions?

All right, Mr. Zemitis?

MR. ZEMITIS: Thank you. Cedrik Zemitis, Department of Finance.

We concur with the staff's proposed amendments to the P's and G's. Allowing for several options for

reimbursing these costs will simplify the process and allow entities flexibility in filing for reimbursement.

We are opposed to increasing the time allowance. Local entities already have several options to determine which way they want to file. Therefore, we believe no changes to the time allowances are warranted. If the actual costs is the right amount that should be reimbursed, they already have that option.

MR. MINNEY: If I may be allowed to comment further? I forgot one.

CHAIR PORINI: Let me ask if there are any questions.

MR. MINNEY: Sure.

CHAIR PORINI: If not, Mr. Minney?

MR. MINNEY: Sure.

The reason why I ended up bringing this here today is when we filed our comments with this analysis back in September, Commission staff had interpreted our request as wanting to increase the number of people that were involved in the process, not the overall time. And so their response in rejecting this proposed amendments was that the productive hourly rate change would be reflective of the changes we were suggesting. But that's not true. We're suggesting the '95-96, the actual amount of time in the claims was much lower than it is.

And if you look at the data submitted in the

attachments, for example, on the first page with districts of enrollment of 20,000, the first four columns reflect the time submitted by EMCN, and the last column is the revised amounts.

The time, for example, of Fairfield-Suisun Joint School District, the total time claimed in '95-96 was 114 hours. The total time claimed in '99-2000 was 1,595. So there's a significant difference in claimed time. And that's -- that change -- and that change is reflective all throughout the school districts that we analyzed. And these are the same districts, by the way, that EMCN used in a random sampling.

CHAIR PORINI: Questions from Members?

MEMBER BELTRAMI: Why would there be a correlation between the number of agenda items and the number of students in a district?

MR. MINNEY: Well, I could probably indirectly respond to that. The larger the district, obviously, the larger the administrative body. San Diego, I remember during the IRC process discussed that the agenda items were generated by essentially three or four different assistant superintendents. And when you're getting a large top of the pyramid, you're getting a much larger process to develop and review agenda item descriptions.

MR. BURDICK: In short, layers of bureaucracy.

CHAIR PORINI: Staff, do you have any -- I'm

sorry, Mr. Beltrami?

MEMBER BELTRAMI: When you say "per agenda item," what does that mean?

MR. MINNEY: If I could respond --

MEMBER BELTRAMI: Well, it's in your item, I presume.

MR. KAYE: Well, he was using our definition.

MEMBER BELTRAMI: That's fine.

MR. KAYE: And this was something that was initially suggested, I believe, by Jim Cunningham of San Diego Unified School District.

We had originally talked about per page and so forth.

MEMBER BELTRAMI: Yeah.

MR. KAYE: But we all felt it was the fairest possible measuring unit to talk about agenda items.

MEMBER BELTRAMI: Well, okay, let's --

MR. KAYE: As long as you exclude from that the repetitive items --

MEMBER BELTRAMI: Boilerplate.

MR. KAYE: -- that kind of thing, yeah.

MEMBER BELTRAMI: And that is excluded?

MR. BURDICK: Yes.

MR. KAYE: Yes.

CHAIR PORINI: All right, other questions, comments?

Staff, did you want to make any comment on this proposal?

MS. OPIE: I would just say that I think, you know, all along, that, you know, the idea was for the claimant's representatives to get together and agree on what the amounts would be.

I think, you know, Mr. Minney is bringing forward some, you know, information that reflects more current claims than what was used in the prior surveys. And, you know, I think it's pretty much up to the Commission to decide whether or not to go with the more current data, as suggested by Mr. Minney, or, you know, stick with what was done.

Another option is to adopt it the way it is. And if that comes to pass, where the costs are higher, there's always the option of amending the P's and G's again.

CHAIR PORINI: A question for staff; they do have the ability now to claim actual costs?

MS. OPIE: Correct.

CHAIR PORINI: So that they would not be disadvantaged; right?

MS. OPIE: Except that, as Mr. Minney points out, that, in some respects, that defeats the purpose. And, you know, everybody was pretty adamant about continuing to have that option to claim actual costs, if they felt like the standard times did not reflect their true costs.

CHAIR PORINI: Mr. Sherwood and Mr. Beltrami?

VICE CHAIR SHERWOOD: I think it would be rather difficult, though, to move ahead with this proposal without having staff take a look at it. We were just presented this today. And I think we -- there are two options here. And if we move into the mode of rehearing this again, we're going to go far beyond the cutoff dates here that have been mentioned by Mr. Kaye.

CHAIR PORINI: Mr. Beltrami?

MEMBER BELTRAMI: Madam Chair, for Mr. Minney, since we just got this; why would there be that much difference in the number of items claimed, under the revise the from the original? What had changed between the revised -- the total hours on the original list and the revised list?

MR. MINNEY: Primarily because of your decision in the IRC for San Diego, where the -- if you'll recall, the Controller had limited San Diego's claim to the top-five-paid employees; and the Commission said, no, that was an inappropriate way to do that because there were more people involved in the mandated activity. And I think Jim had said in one particular instance, there were 30 or 40 people involved.

So when the claims were properly compiled, when all the departments, the assistant, sometimes general counsel, assistant sups., secretaries, all the people that

are involved are actually accounted for in the compilation of these mandated activities, the amount of time is insignificant.

MEMBER BELTRAMI: I'm just amazed that Glendale goes from 195 hours to 2,173 hours. That's a substantial change.

MR. MINNEY: If you look at some of the claims in '95 for some of the large districts, the total time for Pomona Unified School District, 39 hours. They totally unrepresented their claim back in '95-96.

CHAIR PORINI: Mr. Kaye?

MR. KAYE: Ms. Porini, if I may just add a clarification? This amendment was filed, I believe, well over two years ago. And at that time the '99 to 2000-year data didn't even exist. And we all sat around a table, claimants, I believe including Mr. Minney and so forth, and we all agreed that we would use '95-96, which was the date of the current year at that point in time.

And I think one of the things that should absolutely be pointed out -- and again, I don't want to be seen as arguing against the proposition that our schools receive more money as opposed to less money -- but as strange as it seems, I feel duty-bound to indicate that our study was based upon actual claims filed with the State Controller's Office. It was not based upon a hypothetical claim for some actual costs.

And I don't believe that the samples that were conducted for this other thing were actually filed -- or most of them -- I don't even think it's the deadline yet to file those claims with the State Controller's Office.

So basically what we're looking at is a hypothetical sample, in the sense that the Auditor, Controller, or whoever signs off and certifies those claims for schools, I don't believe they've been officially completed.

CHAIR PORINI: Mr. Robeck?

MEMBER ROBECK: This methodology begs of sunsetting a particular set of standards and revisiting them at some point in the future.

MR. BURDICK: It can be revisited at any time.

CHAIR PORINI: Right.

MEMBER ROBECK: You know, to try and redo what we've -- you know, all the interested parties have participated in and staff is involved, I think is inappropriate.

I think we need to go ahead with what the staff has recommended, and then revisit the issue as we go through a consultative process again, sometime in the future, rather than try and redo what, you know, the fruits of what all this labor has produced.

CHAIR PORINI: Was that a motion?

MEMBER ROBECK: That is a motion.

MEMBER STEINMEIER: I'll second that.

MR. MINNEY: Just one point in closing.

CHAIR PORINI: Just one moment.

We have a motion and a second.

Discussion?

MEMBER STEINMEIER: Yeah, I want to -- even though it actually would help my district a whole lot, because I'm under 10,000 -- still understanding the realities of the timetable is ticking, and a lot of work was done previously, with all due respect, Mr. Minney --

MR. MINNEY: Sure.

MEMBER STEINMEIER: -- it's kind of the eleventh hour here. And fortunately we're we're not slamming the door in your face permanently. We can go back and look at maybe some more recent data and get some real close numbers.

I would support Mr. Robeck's proposition that we take this intermediary step, approve this, and invite you back to modify it, if you can justify it.

CHAIR PORINI: Comment, Mr. Minney?

MR. MINNEY: Okay. I see where this is going but I do have to indicate myself in one regard. The prehearing conference which I attended where the information by EMCN was first submitted was not a consensus building, it was a place where I was first handed the information.

When I left the meeting, we submitted comments in

September, rejecting the information in which staff misinterpreted it. So just as a point of indication, I've been trying all along to get it corrected up to this point in time, so --

CHAIR PORINI: All right, we have a motion and a second.

Is there further discussion from Members?

May I have roll call?

MS. HIGASHI: Ms. Halsey?

This is -- I take it, this is a motion to adopt the staff recommendation.

MEMBER HALSEY: The staff recommendation?

MS. HIGASHI: We'll come back to you.

MEMBER HALSEY: Yes.

MS. HIGASHI: Mr. Lazar?

MEMBER LAZAR: Aye.

MS. HIGASHI: Mr. Robeck?

MEMBER ROBECK: Aye.

MS. HIGASHI: Mr. Sherwood?

VICE CHAIR SHERWOOD: Aye.

MS. HIGASHI: Ms. Steinmeier?

MEMBER STEINMEIER: Aye.

MS. HIGASHI: Mr. Beltrami?

MEMBER BELTRAMI: Aye.

MS. HIGASHI: Ms. Halsey?

MEMBER HALSEY: Aye.

MS. HIGASHI: Ms. Porini?

CHAIR PORINI: Aye.

MS. HIGASHI: Thank you.

MR. BURDICK: Thank you very much.

CHAIR PORINI: Thank you.

MEMBER STEINMEIER: More caffeine for Halsey. Would you like it intravenously, Heather? We could get a line up for you.

I understand.

MS. HIGASHI: This brings us to the last item on the agenda that's remaining. It's Item 14. No votes are required from you.

Very briefly, it is a summary of our workload. Some of you may note our workload appears to be fairly stabilized. I'd like to just note for the record that claimants have informed me that we should be receiving probably anywhere from six to a dozen new test claim filings within the next six to eight months.

CHAIR PORINI: Nonetheless, I would like to compliment staff publicly on working down the backlog. I think that claimants will acknowledge that we've been getting through a lot of old issues, and I think you've done a great job. So for all of our staff, thank you.

MS. HIGASHI: Thank you.

(Applause)

MS. HIGASHI: I'd like to introduce two of our

new staff to you today.

First, I'd like to introduce Victoria Soriano. Victoria has just started with us, but she's had a very quick introduction to the agenda binder preparation, and she probably knows all the tabs on every exhibit in your binders.

Next, I'd like to introduce Shannon Similai. Shannon comes to us from the Department of Toxics. And she's working in the staff services analyst capacity. And welcome.

CHAIR PORINI: Thank you.

MS. HIGASHI: The only points I'd just make are that the next agenda is for the meeting in January next year. It is listed as a tentative agenda in the Executive Director's report.

We have made a couple of changes to it just based on today's actions.

On December 21st, Commission staff will be holding an off-site meeting, and it would be the first, I believe, that the Commission staff has ever had. So I encourage you not to call us on that day.

CHAIR PORINI: You'll get the answering machine.

MS. HIGASHI: Well, we will have our cell phones, so we will be checking messages.

CHAIR PORINI: Okay.

MS. HIGASHI: And I'd also like to note that we

did place the hearing calendar in your agenda binders for next year.

CHAIR PORINI: All right, so just for the record, our first hearing next year --

MS. HIGASHI: Is January 25th. And we are awaiting confirmation that we will be in the same hearing room.

MEMBER STEINMEIER: I have a question.

CHAIR PORINI: Ms. Steinmeier?

MEMBER STEINMEIER: Noticing next December, you are scheduling, at least tentatively, the meeting for the 20th. That's --

MS. HIGASHI: Well, that's why I wrote "tentative."

MEMBER STEINMEIER: Oh.

MS. HIGASHI: We usually wait until we got closer. But so far, since I've been here, we've only had special meetings in December.

CHAIR PORINI: Okay, all right.

MS. HIGASHI: Are there any questions?

Thank you very much.

MEMBER BELTRAMI: I hope you all have a nice Christmas.

CHAIR PORINI: Absolutely.

MEMBER BELTRAMI: Happy New Year and holidays.

MEMBER STEINMEIER: Everybody.

MEMBER BELTRAMI: Everybody.

MEMBER STEINMEIER: You guys, too.

CHAIR PORINI: All right. I will announce now that we're going to adjourn into closed executive session pursuant to Government Code Section 11126(e), to confer with and receive advice and legal counsel for consideration and action, as necessary and appropriate, upon pending litigation listed on the published notice and agenda and Government Code Sections 11126(a) and 17526, to confer on personnel matters listed on the published notice and agenda.

MEMBER ROBECK: And all audiences will be quizzed on that statement.

CHAIR PORINI: That's right.

(The Commission met in executive closed session from 2:20 p.m. to 2:42 p.m.)

CHAIR PORINI: All right, we are going to reconvene our meeting after closed session and report from the closed executive session that the Commission met pursuant to Government Code Section 11126(e) to confer with and receive advice from legal counsel for consideration and action, as necessary and appropriate, upon the pending litigation listed on the published notice and agenda, and Government Code Sections 11126(a) and 17526, to confer on personnel matters listed on the published notice and agenda.

With that, if there's no other business to come before the Commission, we are adjourned.

Thank you.

MEMBER STEINMEIER: Happy holidays, everybody. See you next year.

(The hearing concluded at 2:43 p.m.)

--oOo--

REPORTER'S CERTIFICATE

I hereby certify that the foregoing proceedings were reported by me at the time and place therein named; that the proceedings were reported by me, a duly certified shorthand reporter and a disinterested person, and was thereafter transcribed into typewriting by computer.

I further certify that I am not of counsel or attorney for any of the parties to said proceedings, nor in any way interested in the outcome of the cause named in said matter.

In witness whereof, I have hereunto set my hand this 14th day of December 2000.

_____

DANIEL P. FELDHAUS
CSR #6949, RDR, CRR